No. 95-2031-ATX Title: Thomas Young, et al., Appellants
v.
Kirk Fordice, et al.

Docketed: June 18, 1996 Court: United States District Court for the Southern District of Mississippi

Entry	Date	Proceedings and Orders
	May 24 1996	Application (A95-966) to extend the time to file a jurisdictional statement on appeal from June 7, 1996 to June 24, 1996, submitted to Justice Scalia.
	May 30 1996	Application (A95-966) granted by Justice Scalia extending the time to file until June 17, 1996.
	Jun 17 1996	Statement as to jurisdiction filed. (Response due July 18, 1996)
	Jul 8 1996	Brief of appellee United States filed.
	Jul 16 1996	Motion of appellees Kirk Fordice, et al. to affirm filed.
	Jul 31 1996	DISTRIBUTED. September 30, 1996
	Aug 2 1996	Reply brief of appellants Thomas Young, et al. filed.
	Oct 1 1996	PROBABLE JURISDICTION NOTED. The brief of appellants is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The briefs of appellees are to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposiong counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply. SET FOR ARGUMENT January 6, 1997. **********
	Oct 17 1996	Motion of appellees Kirk Fordice, et al. to exclude the United States as a party in the case filed.
	Oct 25 1996	Opposition of Solicitor General to motion of appellees Kirk Fordice, et al. to exclude the United States filed.
	Oct 28 1996	DISTRIBUTED. November 1, 1996 (Page 22)
	Nov 4 1996	REDISTRIBUTED. November 8, 1996 (Page 13)
	Nov 12 1996	REDISTRIBUTED. November 15, 1996 (Page 16)
	Nov 12 1996	Joint appendix filed.
	Nov 12 1996	Brief of appellants Thomas Young, et al. filed.
	Nov 12 1996	Motion of Community Service Society of New York, et al. for leave to file a brief as amici curiae filed.
	Nov 12 1996	Brief amicus curiae of United States filed.
	Nov 12 1996	LODGING consisting of documents submitted by the Solicitor General received.
	Nov 18 1996	Motion of appellees Kirk Fordice, et al. to exclude the United States as a party in the case GRANTED. without prejudice to the Acting Solicitor General filing a brief as amicus curiae for the United States.
	Nov 29 1996	CIRCULATED.
	Dec 4 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 4 1996	Record filed.
	Dec 6 1996	Brief of appellees Kirk Fordice, et al. filed.

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No. 95-2031-ATX

Entry	Date	Proceedings and Orders
	Dec 9 1996	Motion of Community Service Society of New York, et al. for leave to file a brief as amici curiae GRANTED.
	Dec 16 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 27 1996	Reply brief of appellants Thomas Young, et al. filed.
	Jan 6 1997	ARGUED.

Supreme Court, U.S.
FILED

952031 JUN 17 1996

No.
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

THOMAS YOUNG, *ET AL.*,

Appellants,

v.

KIRK FORDICE, *ET AL.*,

Appellees.

On Appeal from the
United States District Court
for the Southern District of Mississippi

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QUESTIONS PRESENTED

1. Whether Mississippi, a state covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, may implement voting changes that create separate sets of registration requirements for federal and state elections, and remove thousands of previously registered voters from eligibility to vote in Mississippi elections, without obtaining preclearance for those changes from the United States Attorney General or the United States District Court for the District of Columbia?

2. Whether the district court erred in ruling, contrary to the holding of *McCain v. Lybrand*, 465 U.S. 236 (1984), that voting changes first announced by Mississippi on February 10, 1995, were precleared by a February 1, 1995, Attorney General preclearance letter addressed to a different set of circumstances?

3. Whether the district court erred in ruling, contrary to the holding of *Perkins v. Matthews*, 400 U.S. 379 (1971), that Mississippi's voting changes were exempt from Section 5 preclearance on the ground that the changes merely corrected a misapplication of state law?

4. Whether the district court erred in ruling, contrary to the holding of *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), that changes in voting procedures are exempt from Section 5 preclearance if adopted in response to federal law?

PARTIES

Actual parties to the proceeding in the United States District Court were:

(1) Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, plaintiffs, appellants herein,

(2) Kirk Fordice, in his capacity as Governor of the State of Mississippi, defendant,

(3) Mike Moore, in his capacity as Attorney General of the State of Mississippi, defendant,

(4) Dick Molpus, in his capacity as Secretary of State of the State of Mississippi, defendant,

(5) Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services, defendant,

(6) United States, plaintiff, and

(7) State of Mississippi, defendant.

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OPINIONS BELOW

The July 24, 1995, opinion of the three-judge United States District Court for the Southern District of Mississippi granting partial summary judgment to the State of Mississippi is unreported and appears in the Appendix ("App.") at 1a-9a. The February 9, 1996, final judgment entered by the district court is unreported and appears at App. 10a-11a.

JURISDICTION

The final judgment of the court below was entered on February 9, 1996. The *Young* appellants, Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, filed their notice of appeal on April 8, 1996. App. 12a-14a. On May 30, 1996, Justice Scalia extended the time in which to file a jurisdictional statement to June 17, 1996, and this appeal is being docketed within the time provided by that extension. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Right Act, 42 U.S.C. § 1973c, is set forth at App. 26a-27a. The pertinent provisions of Sections 8 and 11 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-6, 1973gg-9, are set forth at App. 28a.

STATEMENT OF THE CASE

This case arises out of the State of Mississippi's response to the passage of the National Voter Registration Act of 1993 ("NVRA"). The NVRA, which became effective in Mississippi on January 1, 1995, requires states to make voter registration more easily accessible and limits the circumstances under which

a registered voter's name may be removed from the voter rolls.[1] Its requirements apply only to registration and record-keeping for federal elections, although, as the district court found, states have discretion "to meld the NVRA requirements into the existing state system for registration of voters." App. 2a. The NVRA provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act . . . ." 42 U.S.C. 1973gg-9(d)(2).

A. Mississippi's Pre-NVRA Voter Registration System.

At the time the NVRA was enacted, and continuing through the present, Mississippi's statutes have provided for a unified system of voter registration, such that when qualified persons complete the registration process in their county of residence, they are eligible to vote in all local, county, state and federal

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[1] The NVRA created nationwide standards requiring the States to end "discriminatory and unfair registration laws and procedures" which Congress found "have a direct and damaging effect on voter participation" including disproportionate harm to racial minorities. 42 U.S.C. § 1973gg(a)(3). The purpose of the NVRA was to provide citizens in covered states access to a registration process that is as convenient as possible. § 1973gg-2(a). Eligible citizens must be able to register as easily as they receive other services and assistance from state agencies and in state offices. The primary requirements of the NVRA are: (1) states must permit voter registration simultaneously with applications for, or renewal of, drivers' licenses at motor vehicle offices, *see* 42 U.S.C. § 1973gg-3; (2) states must accept mail-in voter registration forms and make such forms widely available, *see* 42 U.S.C. § 1973gg-4; (3) states must designate and provide voter registration opportunities in public assistance offices, offices primarily engaged in providing state-funded programs for persons with disabilities, armed forces recruitment offices, and in other governmental or non-governmental offices designated by the state, *see* 42 U.S.C. § 1973gg-5; and (4) states must maintain an accurate and current voter registration roll through uniform and non-discriminatory procedures, with limits on purges of voter rolls, *see* 42 U.S.C. § 1973gg-6.

elections. Miss. Code Ann. §23-15-11. The State adopted this "unitary" registration system after Mississippi was found to have violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by maintaining a "dual" voter registration system that required separate registration for state and municipal elections. *Mississippi Chapter of Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991). Specifically, the *PUSH* court found that Mississippi had adopted and maintained this dual registration system for a discriminatory purpose, and that the dual system had a racially discriminatory impact in depressing black registration rates.[2] *Id.* at 1252, 1268. Mississippi's unitary registration provisions were enacted for the purpose of curing this violation of Section 2. *PUSH v. Allain*, 717 F. Supp. 1189, 1193 (N.D. Miss. 1989), *aff'd*, 932 F. 2d 400 (5th Cir. 1991).

Some of Mississippi's registration procedures, nevertheless, remained more restrictive than those now permitted by the NVRA. For example, Mississippi's voter registration statutes allow the purging of voters who have not voted in four years at the discretion of county registration officials. Miss. Code Ann. § 23-15-159. In addition, the statutory state mail-in registration form requires an attesting witness, and requires more information than is necessary for determining voter eligibility and maintaining

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[2] The lower court decision in *PUSH v. Allain* documents the long legacy of intense racial discrimination that has pervaded every aspect of life in Mississippi, including the process of registration and the exercise of the right to vote. 674 F. Supp. at 1250-52. The court found that serious disparities in registration and voter turnout rates of blacks and whites in Mississippi were the direct legacy of this racial discrimination, and were exacerbated by the State's onerous dual registration requirements. *Id.* at 1252-56. At the time of the *PUSH* decision, Mississippi was the only state with a dual registration system. *Id.* at 1252. However, even under this dual system, registration for state and county elections made a voter eligible to vote in federal elections. *Id.* at 1249.

registration rolls, all of which are prohibited by the NVRA. Miss. Code Ann. § 23-15-47.

B. Mississippi's Response to the NVRA.

Following the enactment of the NVRA in 1993, Mississippi Governor Kirk Fordice issued an executive order that named Secretary of State Dick Molpus as "the chief state election officer for the purposes of compliance with the National Voter Registration Act of 1993" and created a National Voter Registration Act Implementation Committee, which had the responsibility of "ensuring Mississippi's compliance with the Act." Young Plaintiffs' Cross-Motion For Summary Judgment ("Summ. Judg. Mot.") Ex. 1. Although the Committee produced a report describing the legislative changes necessary to bring Mississippi into substantial compliance with the NVRA, in 1994 the Mississippi Legislature made only one change in response to the Act: it changed the mail-in voter registration period from 60 to 30 days before an election. Comp. ¶ 35; Amended Ans. ¶ 35.

However, starting in February 1994, the Implementation Committee and the Secretary of State's office developed substantial materials and conducted extensive NVRA training for county clerks and election officials as well as for officials and personnel of the various agencies that would become voter registration sites in accordance with the NVRA. Summ. Judg. Mot. Ex. 3. The training materials included a manual to guide the registration activities of these public officials and employees. Summ. Judg. Mot. Ex. 4. The procedures and forms described in the manual were to be implemented as of January 1, 1995. Summ. Judg. Mot. Ex. 3 and 10. Legislation to conform Mississippi's practices to the NVRA more generally was introduced in the January 1995 legislative session.

C. Mississippi's NVRA Submission to the United States Attorney General.

In late October 1994, the Department of Justice learned that Mississippi was proceeding with plans to implement the NVRA administratively effective January 1, 1995, despite the fact that none of its implementation plans, revised forms, or training materials, which described substantial changes in voter registration procedures, had been submitted for Section 5 preclearance. The Department of Justice informed the State that preclearance of these new procedures and forms was necessary prior to their implementation. Summ. Judg. Mot. Ex. 9. The Secretary of State's office complied with the request, making a submission to the Department of Justice through transmission of several letters and a packet of materials setting forth the NVRA practices that were to be implemented "prior to the passage of the state legislation." Summ. Judg. Mot. Ex. 9. A letter dated December 20, 1994 from Constance Slaughter-Harvey, General Counsel to the Secretary of State and Assistant Secretary of State, Elections, stated:

> [C]onsider this letter as a request for preclearance under Section 5 of the Voting Rights Act of Mississippi's plan to administratively implement the provisions of NVRA, in accordance with the package of materials which were submitted to your office on December 5 and December 14, 1994.
>
> In particular, please regard the publication dated November 1994 and entitled "The National Voter Registration Act" as Mississippi's plan to administratively implement NVRA on January 1, 1995. [Summ. Judg. Mot. Ex. 10.]

This manual described a set of registration and record-keeping procedures to be used generally by circuit clerks and other election officials, with no provisions indicating that a separate set of registration requirements and procedures would be maintained for state and local elections, and no provisions suggesting that registrants would be advised that they would be limited to voting in federal elections only. None of the submission letters sent to the Department of Justice makes reference to implementing a dual registration system. Indeed, the manual provided copies of the new voter registration forms that would replace the State's prior forms when implementation of the NVRA began on January 1, 1995, and the forms make no distinction between eligibility for state and federal elections. For example, the new registration form for use at the driver's license agency stated: ". . . you may register to vote in Mississippi while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form . . . ." Summ. Judg. Mot., Ex. 4.[3] In addition to the manual, the packet of materials sent to the Attorney General included background materials such as Implementation Committee reports, schedules of training that had occurred, and draft legislation to be introduced in early 1995 conforming state law to these NVRA procedures.

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[3] Similarly, the new mail-in form, which was also to be used at public assistance and other voter registration agencies asked: "If you are not registered to vote where you now live, would you like to register to vote here today?" *Id.* Further, among items under the heading "Current methods that will change," the manual included the following statements: "'the optional 4-year purge is prohibited', [and] "a registrant's name cannot be removed solely for not voting." *Id.*

In early January 1995, registrars and other local election officials began registering voters under the Secretary of State's administrative plan set forth in the implementation manual. App. 7a. Voters were registered under the assumption that they would be eligible to vote in all elections, and were not advised that they would be required to register under separate procedures for state and local elections. App. 7a.

On January 25, 1995, the bill that was designed to amend Mississippi's election statutes so as to integrate the NVRA requirements was tabled in a legislative committee.[4] The United States Attorney General was aware of the committee's action, but the State did not amend or withdraw its Section 5 submission.

On February 1, 1995, the United States Attorney General, acting through the Department of Justice, precleared certain specifically defined aspects of the State's submission. App. 15a-19a. The preclearance letter sent to the State by the Department of Justice addressed only the changes set forth in the Secretary of State's submission, and makes no mention of any change from Mississippi's unified system of voter registration to a dual system of registration. Summ. Judg. Mot. Ex. 10.

D. Mississippi's Change to a Dual Registration System.

On February 10, 1995, Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State's

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[4] This was the last day that bills could be voted out of committee in the regular session. App. 21a. It was still possible, however, for the legislature to vote to suspend the rules and bring the bill to the floor. Thus, tabling the bill in committee did not necessarily mean that the legislature could not act on the bill later in the session. Although the legislature would remain in session for almost three more months, no successful vote to suspend the rules and bring the bill to the floor was taken.

Office, issued a memorandum to the Circuit Clerks of the various counties of the state and the chairpersons of the Mississippi County Election Commissions on the subject of implementation of the NVRA. App. 20a-23a. This memorandum stated that "Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections," App. 21a , and that "[a]nyone who has thus far registered under NVRA, or will do so in the future. . . [should] be informed that they presently are only authorized to vote in federal elections." *Id.*

The memorandum also addressed the topic of "[d]esignating voters registered under NVRA on the voter registration rolls." App. 22a. It stated that "circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must 'flag' voters registered under NVRA on the voter registration books and poll books to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections." *Id.* The memorandum also stated that all voters who registered to vote under the NVRA procedures should be notified of their federal-election-only eligibility status and provided with a reasonable opportunity to re-register for state elections, although it did not prescribe specific procedures that must be followed in giving such notice or opportunity to re-register, leaving that up to the discretion of individual officials.[5] App. 21a-22a.

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[5] Mississippi and Illinois are the only states that have sought to implement the NVRA through a dual registration system. In Illinois, the legislature also failed to pass legislation merging the NVRA with existing state procedures, and the state administratively implemented a dual registration system. Illinois' dual system was recently invalidated on state constitutional and statutory grounds. *Orr v. Edgar*, 95 CO 0246 (Cir. Ct. Cook Co., May 1, 1996).

The result of this was the division of the electorate into two classes of voters for the first time since the resolution of the *PUSH v. Allain* litigation. All of these voters met the same statutorily defined voter eligibility criteria, and differed only in what forms they had filled out and at what site they had obtained the eligibility form. This dual eligibility status and new record-keeping and purging procedures required the circuit clerks to institute numerous changes in registration procedures.[6] Some several thousand voters who registered under the presumption of eligibility for all elections using the NVRA procedures were removed from the regular voter rolls and/or given federal election only eligibility status. App. 7a. There was substantial variation among different county circuit clerks in the manner in which they implemented this new dual system, and in the procedures they followed to notify NVRA registrants of their limited eligibility and provide them with an opportunity to register for state elections.[7]

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[6] Among these changes were creating of new "federal voter only" registration cards for NVRA registrants, dep. of Barbara Dunn, Hinds Co. Circuit Clerk, Summ. Judg. Mot. Ex. 17, p. 26, and Rose Simmons, Bolivar Co. Circuit Clerk, Summ. Judg. Mot. Ex. 15, p. 14; sending only letters rather than voter registration cards to NVRA registrants, dep. of Carol Horton, Lee Co. Deputy Circuit Clerk, Summ. Judg. Mot. Ex. 16, p. 14; and distinguishing NVRA registrants from state voters in voter registration records, dep. of Marian Brown, Forrest Co. Circuit Clerk Co., Summ. Judg. Mot. Ex. 19, p. 17.

[7] These practices ranged from sending a notification letter with no voter registration form, dep. of Brenda Williams, Warren Co. Circuit Clerk, Summ. Judg. Mot. Ex. 20 p. 12, to sending a letter along with a blank state form, Dunn dep., pp. 9-10, to sending a notification letter accompanied by a partially completed registration form, dep. of Mahala Salazar, Lowndes Co. Circuit Clerk, Summ. Judg. Mot. Ex. 18, pp. 11-12. Only one of the six counties whose practices were covered in deposition issued public service announcements in the local media and followed up on this notification with telephone calls, Brown dep., p. 11.

E. The Department of Justice's Response to the Creation of a Dual Registration System.

On February 16, 1995, the Department of Justice sent a letter informing the State that the changed voting procedures described in the February 10, 1995, memorandum constituted implementation of a dual voter registration and purge system, that these procedures had not been submitted by the State for § 5 review, and that they were legally unenforceable until they had received § 5 preclearance. App. 24a-25a. This letter specifically stated that the submission which had been the subject of the February 1, 1995, preclearance, ". . . did not seek preclearance for a dual registration and purge system . . ." App. 25a.

On March 9, 1995, the State responded to this letter by asserting that it had ". . . not initiated, nor implemented any change affecting voting within the State, other than the implementation of the NVRA . . . . The changes affecting voter registration most recently implemented by the State are those mandated by NVRA, not any change initiated or instituted by the State." Summ. Judg. Mot. Ex. 14, at 1-2. To this date, the State of Mississippi has not filed a Section 5 submission regarding these voting changes and has continued to implement them.

F. Proceedings in the District Court.

With the State of Mississippi refusing to submit the voting changes that created the dual registration and purge system for Section 5 preclearance despite the prompt request of the Department of Justice and making only a limited effort to comply with the NVRA, the Young plaintiffs filed suit against the State

on April 20, 1995.[8] The action sought declaratory relief under Section 5 of the Voting Rights Act and the NVRA.[9]

Specifically, Count II of the Young plaintiffs' complaint sought declaratory relief under Section 5 alleging that these changes related to voter registration and purging had not been precleared and therefore were not enforceable until preclearance was obtained. Comp. ¶ 2. The Young plaintiffs advanced two theories for establishing Section 5 liability. First, their Section 5 claim alleged that the change from the State's pre-NVRA statutory unitary registration system to the dual registration system was an unprecleared voting change, the implementation of which should be enjoined. *Id.* ¶ 68. The Young plaintiffs' Section 5 claim also alleged that the change from the previously precleared unitary administrative NVRA implementation plan to this dual registration system created by the February 10 memo was an unprecleared voting change whose implementation should be enjoined. *Id.* ¶ 69. The State's answer denied that the voting

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[8] Appellants, plaintiffs below, are a group of black and white citizens of the State of Mississippi who meet the State's qualifications to register to vote. The defendants below were Kirk Fordice, Governor of Mississippi, Mike Moore, Attorney General of Mississippi, Dick Molpus, Secretary of State of Mississippi, and Don Taylor, Executive Director of the Mississippi Department of Human Services. Mr. Taylor, the current Executive Director, was substituted for Gregg Phillips, who was Executive Director when the suit was instituted. This case was consolidated below with *United States v. State of Mississippi, et al.*, Civil Action No. 3:95CV198(L)(N), a similar action brought by the United States seeking relief under Section 5 of the Voting Rights Act and the NVRA.

[9] The NVRA cause of action alleged that the State had not fully implemented the requirements of the NVRA even for federal elections. Those allegations are not at issue on this appeal, as the plaintiffs agreed to dismissal of the NVRA claim after the state improved its implementation later in 1995.

changes were subject to preclearance, alleging that changes made to comply with the NVRA were outside the scope of Section 5, and that the changes presented in the Secretary of State's Section 5 submission had not been applicable to state or local elections. Answer ¶¶ 41, 43.

All parties subsequently moved for partial summary judgment on the Section 5 count of the two complaints. The State's motion asserted that the State was not "administering or seeking to administer" any unprecleared changes relating to the implementation of the NVRA because

> no changes to state registration or purging for state elections were mandated or contemplated by the Act and no such changes were necessary for full implementation of the NVRA. No changes to the State system for registration or purging were made in conjunction with the implementation of the NVRA. Accordingly, no Section 5 submissions for preclearance relating to State registration or purging were necessary or made. [State Summ. Judg. Mot., ¶¶ 3-4].

The State also asserted that the Attorney General's February 1, 1995, letter had the effect of preclearing a limited number of voting changes, but only so far as they related to federal elections.[10] Ignoring the reality of its own directives to county election officials and the resultant practices, the State's motion asserted that "[t]here is no requirement of dual registration

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[10] Those allegedly precleared changes consisted of certain discretionary choices related to (1) the selection of optional voter registration agencies (42 U.S.C. §1973gg-5) and (2) procedures for removal of voters from voter registration rolls, "purging" (42 U.S.C. §1973gg-6). State Summ. Judg. Mot. ¶ 5, Brief In Support of Consolidated Motions For Partial Summary Judgment, p. 7.

administered by the State or any of its political subdivisions." State Summ. Judg. Mot. ¶ 9. The Young plaintiffs' cross-motion for partial summary judgment argued that "[t]he State of Mississippi has not filed a Section 5 submission regarding the changes in voter registration and list maintenance procedures that were set out in the February 10 memorandum." Summ. Judg. Mot. ¶ 15.

In a decision that cites no case authority, the district court granted the State's motion for summary judgment as to the plaintiffs' Section 5 claims on July 24, 1995, holding that Mississippi was not required to obtain Section 5 preclearance for the changes that established the dual registration and purging system. The district court held that the United States Attorney General's February 1, 1995, preclearance letter had not served to preclear the unitary registration system submitted by the Mississippi Secretary of State, because the Secretary of State lacked authority to implement such a unitary system without passage of new legislation by Mississippi. App. 7a. The court then held that "it is equally clear -- and this does not appear to be in dispute -- that the contents of the package regarding only administrative decisions of the state have been precleared." App. 8a. The district court did not specify precisely what "administrative decisions" made by the State it was holding to have been precleared.[11] It appears that the court, in effect, redefined the scope of the State's prior Section 5 submission, concluding that some changes in registration procedures were selectively precleared *only for use in relation to federal elections*, even though the State's submission had not distinguished between federal and state elections. The court believed that this

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[11] The plaintiffs consistently argued that the February 1, 1995, preclearance letter did not effect preclearance of changes for use in a dual registration system.

redefinition of the submission was required because the Attorney General could not have intended to preclear a unitary system when it was aware that conforming legislation had not yet been enacted.

The court further reasoned, based on its finding that the Secretary of State could not properly apply NVRA registration procedures to state and local elections without an enactment by the legislature, that the new procedures spelled out in the State's February 10, 1995, memorandum were intended merely to correct a misapplication of state law and therefore could be implemented without preclearance:

> We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General. [App. 8a.]

Finally, the Court accepted the State's argument that adoption of a dual registration system in response to an enactment of Congress placed these changes outside the scope of Section 5 and obviated the need for preclearance. The district court held:

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. [App. 8a-9a.]

REASONS FOR NOTING PROBABLE JURISDICTION

The court below held that Mississippi need not obtain Section 5 preclearance for dramatic changes to voter registration procedures that the State implemented beginning February 10, 1995. The lower court's decision creates three new exceptions to the preclearance requirement, each of which this Court has decisively rejected in its rulings interpreting Section 5. The district court failed to cite a single decision by any court supporting the result it reached. Plenary review or summary reversal by this Court is necessary to assure that Section 5 will be properly enforced in Mississippi, and that states implementing the requirements of the National Voter Registration Act of 1993 do not abridge rights guaranteed by the Voting Rights Act.

1. The district court's decision conflicts with *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Clark v. Roemer*, 500 U.S. 646 (1991), by holding that the Attorney General's February 1, 1995, preclearance of a unitary voter registration system submitted by the Mississippi Secretary of State implicitly precleared later changes that created separate systems of voter registration and record-keeping for federal and state elections in Mississippi. Mississippi's Section 5 submission never identified at all, much less "with specificity," *Clark*, 500 U.S. at 658, any changes that would create separate systems of registration and record-keeping for federal and state elections. Section 5 places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes, *McCain*, 465 U.S. at 249. Any ambiguity as to what was submitted must be resolved against the State. *Clark*, 500 U.S. at 659. The district court therefore erred in accepting Mississippi's after-the-fact effort to redefine the State's Section 5 submission.

2. The district court further erred in holding that Mississippi's February 10, 1995, voting changes were exempt from preclearance on the ground that the changes merely corrected "a misapplication of state law." App. 8a. The court reached this result by ruling that the registration of thousands of voters in early 1995 under an administrative plan developed by the Secretary of State was not authorized by Mississippi's existing statutes, and that the State could therefore implement separate registration and record-keeping systems for federal and state elections and remove thousands of previously registered voters from the state's rolls without obtaining Section 5 preclearance from the Attorney General. This ruling squarely conflicts with *Perkins v. Matthews*, 400 U.S. 379 (1971), in which this Court held that covered jurisdictions cannot avoid the preclearance requirements of Section 5 by treating their own previous voting procedures as a nullity. Indeed, under *Perkins* and other decisions, the motives of the State in making a voting change are irrelevant in a Section 5 enforcement action such as this.

3. Finally, the district court opened a gaping loophole in Section 5 coverage by holding that voting changes are exempt from the Section 5 preclearance requirement when made to comply with a federal statute such as the NVRA. In *Allen v. State Bd. Of Elections*, 393 U.S. 544 (1969), this Court rejected precisely that argument, holding that voting changes made by covered states are not exempt from preclearance even when implemented in an effort to comply with the Voting Rights Act itself. Further, the district court's holding ignores the express language of the NVRA, which provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965," 42 U.S.C. 1973gg-9(d)(2).

For all these reasons, this Court should review the decision of the court below to assure that Section 5 enforcement will not

be compromised by the creation of erroneous exceptions to long-standing decisions of this Court.

I. THE DISTRICT COURT'S RULING CONFLICTS WITH *McCAIN V. LYBRAND* BY HOLDING THAT VOTING CHANGES FIRST ANNOUNCED BY MISSISSIPPI ON FEBRUARY 10, 1995, WERE PRECLEARED BY A FEBRUARY 1, 1995, ATTORNEY GENERAL PRECLEARANCE LETTER ADDRESSED TO A DIFFERENT SET OF CIRCUMSTANCES.

Section 5 requires that before a covered jurisdiction such as Mississippi "shall enact or seek to administer" any voting change, it must first obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. Such changes in procedures affecting voting are legally unenforceable unless and until Section 5 preclearance has been obtained. *Allen*, 393 U.S. at 548-549; *Clark*, 500 U.S. at 652; *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1193 (1996).

The State of Mississippi is now using a set of voter registration procedures dramatically different from those it was using in 1994, prior to the effective date of the NVRA, *and* different from those for which preclearance was granted by the Department of Justice on February 1, 1995. The State's February 10, 1995, memorandum instituted changes affecting how and where an eligible person may register to vote, the elections in which a voter will be deemed eligible to participate, how a registered voter can be removed from the voter rolls, the content of registration forms, the locations where various forms will be distributed, and publicity concerning assistance in registration, among other matters. App. 20a-23a. *See* Statement of the Case, *supra* at 7-9.

These changes, which directly affect access to the franchise, are clearly changes affecting voting that have the "*potential* for discrimination," *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Indeed, black voters in Mississippi were disproportionately disqualified from voting in municipal elections under Mississippi's prior dual registration system for state and local elections, according to the district court's 1987 findings striking down that dual system under Section 2 of the Voting Rights Act in *PUSH v. Allain*. 674 F. Supp. at 1255. Further, unless careful safeguards are maintained, voters who take advantage of the liberalized registration procedures for federal elections may not realize that their registration is invalid for state and local elections, and may appear at the polls on election day only to be turned away. The State's February 10, 1995, memorandum exacerbates the potential for discrimination by leaving wide discretion to circuit clerks in determining how to set up and implement the new dual registration requirement. *PUSH*, 674 F. Supp. at 1267 (finding that "widespread variations among counties in voter registration practices, as attested to by the various circuit clerks, may result in the unequal treatment of similarly situated persons"). Changes such as these clearly fall within the Section 5 preclearance requirement.[12]

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[12] "[T]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Bd.*, 393 U.S. at 566. The Attorney General's regulations enforcing Section 5 include as examples of voting changes: "(a) Any change in qualifications or **eligibility** for voting," and " (b) Any change concerning **registration**, balloting, . . .and any change concerning **publicity for or assistance in registration** or voting." Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.12 and § 51.13 (emphasis added).

The district court's decision holding that preclearance is not required for these changes rests on theories that this Court has repeatedly rejected in cases interpreting the preclearance requirements of Section 5. Key to the district court's decision is its statement that "the contents of the package regarding only administrative decisions of the state have been precleared." App. 8a. Whatever the court means by the "administrative decisions of the state,"[13] the court's conclusion is incorrect as a matter of law. The only submission that received preclearance from the United States Attorney General on February 1, 1995 was the Secretary of State's submission of a unitary set of voting changes to be used in all elections, federal, state and local. That submission did not include *any* procedures for distinguishing "federal" registrants from registrants for other elections; such procedures were first created by Mississippi in the State's February 10, 1995, memorandum. Thus, only by retroactively redefining the submission that the United States Attorney General precleared on February 1, 1995, could the district court conclude that any of the

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[13] Although neither the quoted passage, nor any other portion of the opinion, makes clear what voting changes the district court deems to have been precleared, the relief sought by the State in its motion for summary judgment should define the limits of the court's ruling. The State did not allege that all of the voting changes instituted by the February 10, 1995, memorandum, including the dual voter registration system, had been precleared by the February 1, 1995, letter from the Department of Justice. The State's motion for summary judgment argued only that preclearance had been obtained for certain limited discretionary choices granted to the States by the NVRA, specifically: (1) the selection of optional voter registration agencies (42 U.S.C. §1973gg-5) and (2) procedures for removal of voters from voter registration rolls, or "purging," (42 U.S.C. §1973gg-6). State Summ. Judg. Mot., ¶ 5; Brief In Support of Consolidated Motions For Partial Summary Judgment at 7. To the extent the district court's opinion concludes that any broader preclearance was granted, such an interpretation would be outside the scope of the claim advanced by the State.

changes announced in the State's February 10, 1995, memorandum had somehow been precleared.

Such after-the-fact efforts to redefine Section 5 submissions have been emphatically rejected by this Court, because "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *McCain*, 465 U.S. at 249. Section 5 thus places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes. *Id.*

In *McCain*, this Court reversed a district court judgment denying plaintiffs' request for an injunction prohibiting further elections under a system of county government created by a 1966 statute that was never submitted for preclearance. The district court had ruled that the 1966 statute was implicitly precleared when the United States Attorney General granted preclearance to a 1971 South Carolina statute increasing the size of the county council from three seats to five seats, because the seats were all to be elected using the election system set forth in the 1966 statute. In reversing, this Court announced the principle that should dispose of this issue in the instant case:

> A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.

Id. at 256-257.

Mississippi's December 1994 submission describes changes that are to be implemented in a unified voter registration system. The request for preclearance failed to identify the many changes

that are required to implement the dual system set forth in the State's February 10, 1995, memorandum. The submission makes no reference to the implementation of a two-tier system of voter registration and record-keeping, or to the registration and purging of voters who are eligible to vote only in federal elections. Summ. Judg. Mot. Ex. 2-4, 9 & 10. The February 1, 1995, preclearance letter did not, and could not, provide preclearance for changes that were not part of the submission.[14] The district court's decision is thus in clear conflict with *McCain v. Lybrand*.

McCain also emphasized that deference should be given to the United States Department of Justice when it determines that specific voting changes are outside the scope of a previous preclearance decision, holding that reliance on the Justice Department's interpretation of its own preclearance decision is appropriate "in determining whether a particular change was actually precleared . . . ." 465 U.S. at 255-56. As noted above, in this case the Justice Department responded to the February 10, 1995 memorandum with a letter dated February 16, 1995, stating that the Department had not precleared voting changes for a dual registration system, and requesting that the changes described in the memorandum be submitted for preclearance prior to implementation. App. 24a.

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[14] Just as the numbered posts used for elections in *Lockhart v. United States*, 460 U.S. 125 (1983), were "integral part[s] of the new election plan," and subject to Section 5 review as part of the whole election plan, 460 U.S. at 131, the various practices that are part of Mississippi's dual registration and record-keeping system are integral to its operation. To determine whether these changes are discriminatory in purpose or effect, the Attorney General "cannot view these [changes] in isolation," without considering that they are part of a new two-tiered system. *Id.*

This Court unanimously reaffirmed the holding of *McCain* in *Clark v. Roemer*. In *Clark*, the district court agreed with Louisiana's theory that preclearance of an increase in the number of judgeships by implication precleared "all of the judicial positions necessary to reach that number." 500 U.S. at 657. This Court reversed that decision as explicitly contradicting the holding in *McCain*, holding that a covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider," *id.* at 658, and confirming the doctrine that "'any ambiguity in the scope of the preclearance request' must be construed against the submitting jurisdiction." *Id.* at 659 (citation omitted). As the Court explained, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5," *id.* at 658, and that acceptance of the district court's holding "would create incentives for [covered jurisdictions] to forego the submission process altogether." *Id.* at 659. Here, the submission upon which the Attorney General acted never identified at all, much less "with specificity," any changes that would create separate systems of voter registration, record-keeping, and purging for federal and state elections. *Id.* at 658. *See also Dupree v. Moore*, 776 F. Supp. 290 (S.D. Miss, 1991), *vacated*, 503 U.S. 903, *on remand*, 831 F. Supp. 1310 (1993), *appeal dism.*, 114 S.Ct. 872 (1994), *vacated*, 115 S.Ct. 1684 (1995), *aff'd*, ___ S.Ct. ___, (U.S. June 10, 1996) (No. 96-1624).

Further, although conforming legislation was tabled in committee shortly before the February 1, 1995, preclearance letter was issued, and the Attorney General learned of that fact, the state did not withdraw or alter its Section 5 submission. Even if the Attorney General could be charged with knowledge that the State might now wish to require separate registration procedures for federal and state elections, it is not sufficient that the Attorney General may have known of a potential change; the responsible authorities must "in some unambiguous and recordable manner

submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Allen*, 393 U.S. at 571.

In sum, the notion that the February 1, 1995, preclearance letter did *not* preclear the unitary system that was submitted, but selectively and prospectively precleared the voting changes first described in the State's February 10th memorandum, cannot be squared with the holdings of *McCain* or *Clark*.

II. THE DISTRICT COURT'S RULING CONFLICTS WITH *PERKINS V. MATTHEWS* BY HOLDING THAT MISSISSIPPI'S VOTING CHANGES WERE EXEMPT FROM PRECLEARANCE ON THE GROUND THAT THE CHANGES MERELY CORRECTED A MISAPPLICATION OF STATE LAW.

The district court's opinion articulates a further Section 5 exception that directly conflicts with this Court's precedents. The court ruled that the Mississippi Secretary of State was without authority, under State law, "to effectuate a change in the election laws contrary to [Mississippi's] legislative enactments," and therefore could not implement procedures permitting NVRA registrants to vote in local and state elections. App. 7a. The court reasoned from this that the State's February 10, 1995, memorandum instructing election officials to remove NVRA registrants from the rolls and to implement a system of dual registration and record-keeping was not a change requiring preclearance, because the changes were made for the purpose of correcting a misapplication of state law. App. 8a.

This holding is in error for several reasons. First, states cannot avoid the preclearance requirements of Section 5 by treating their own previous voting procedures as a nullity. Such a loophole in Section 5 coverage was closed in *Perkins v.*

Matthews. In *Perkins*, black voters sued to enjoin the City of Canton, Mississippi from implementing a change from a ward system to a system of at-large elections for aldermanic elections scheduled for 1969. The City of Canton argued that its previous ward elections had been conducted contrary to a 1962 Mississippi statute requiring at-large aldermanic elections, and that the change to at-large elections was therefore exempt from preclearance because the change was necessary to conform Canton's procedures to State law. This Court reversed the district court's judgment in favor of Canton, holding that, regardless of whether ward elections were authorized by State law at the time, the City's previous use of ward elections showed that "the procedure . . . 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Perkins*, 400 U.S. at 395. A change from that procedure was therefore a change requiring preclearance under Section 5, regardless of the mandates of the 1962 Mississippi statute.

The *Perkins* Court pointed out that the local district court had exceeded its jurisdiction in a Section 5 enforcement action by inquiring into the motives of the City of Canton in adopting the changes in question. The jurisdiction of a local three-judge district court in cases brought to enjoin use of an unprecleared voting change is "limited to the determination whether 'a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny.'" *Perkins*, 400 U.S. at 383, quoting *Allen*, 393 U.S. at 561. The City of Canton's desire to conform its practices to state law might be relevant in determining the substantive question of whether Canton was entitled to preclearance for the change in voting procedures, but that question, the Court held, was reserved to either the District Court for the District of Columbia or the United States Attorney General. *Perkins*, 400 U.S. at 384 ("it is not the function or prerogative of [the local three-judge district court] to determine the motive" of a covered jurisdiction in adopting a voting

change). This Court therefore held that the "bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide." *Id.* at 395.

Thus, the holding in *Perkins* means that the State's reasons for implementing the voting changes described in the February 10, 1995, memorandum will become relevant only if and when the State seeks preclearance of those changes pursuant to Section 5. *See also City of Lockhart*, 460 U.S. at 132-133 (following *Perkins*). Indeed, if the district court's ruling in this case were correct, the City of Canton could have evaded the holding in *Perkins*, and avoided submission of its voting changes, simply by asking the State to issue a memorandum ordering it to "correct" its "misapplication of state law" by instituting at-large elections. *Cf.* App. 8a.[15]

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[15] In any event, the district court's conclusion that the Secretary of State lacked authority for his actions is incorrect, even if, contrary to *Perkins*, the question were relevant here. The Secretary of State was designated the chief election official of the State for purposes of implementing the NVRA, and his oath of office placed upon him serious responsibilities regarding compliance with the U.S. Constitution and statutes, which required him to implement the NVRA by January 1, 1995. Moreover, the administrative implementation plan developed by the Secretary of State was widely communicated to election officials throughout the State beginning nearly a year prior to January 1, 1995, and election officials throughout the State actually registered thousands of voters under those procedures and added them to the rolls for all elections, federal, state and local, in early 1995. Further, the statutory policy of the State of Mississippi was to have a unitary voter registration system, and the district court never explained how the Secretary of State could be authorized to ignore that State statutory policy but unauthorized to implement the administrative changes he did make to the content of voter registration forms, procedures, and locations. Indeed, the difficulty of determining what State law requires in this situation shows the wisdom of keeping questions of state law authority out of Section 5 enforcement actions such as this.

Second, even if, contrary to *Perkins*, the question of the Secretary of State's authority under Mississippi law were controlling, the district court's decision would still have to be reversed. If the district court were correct in treating the Secretary of State's implementation procedures, and their submission to the Attorney General for preclearance, as nullities because the Secretary of State lacked authority, the State's February 10, 1995, memorandum still reflects a change from the procedures in use in 1994, prior to the Secretary of State's submission. Under this theory, then, Mississippi still is clearly in violation of Section 5, having implemented changes set forth in its February 10, 1995, memorandum in the absence of effective preclearance of *any* changes to its registration system.[16]

Perkins and *Lockhart* establish that questions of state law authority for voting changes cannot serve to carve out an exception to the Section 5 preclearance requirement. The new election systems implemented in those cases were changes affecting voting that required preclearance. There can be no doubt that the same is true for the State of Mississippi's changes to a dual voter registration and record-keeping system.[17]

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[16] The first of the Young plaintiffs' two claims for Section 5 relief alleges that the new voter registration and record-keeping procedures that were put into place by the State's February 10, 1995, memorandum were unprecleared voting changes compared to the voting practices that prevailed in Mississippi in December of 1994. Comp., ¶ 68.

[17] *See also McDaniel v. Sanchez*, 452 U.S. 130, 152 (1981), "The application of the statute also is not dependent upon any showing that the Commissioners Court had the authority under state law to enact the apportionment plan at issue in this case."

III. THE DISTRICT COURT'S RULING CONFLICTS WITH *ALLEN V. STATE BD. OF ELECTIONS* BY HOLDING THAT CHANGES IN VOTING PROCEDURES ARE EXEMPT FROM SECTION 5 PRECLEARANCE IF ADOPTED IN RESPONSE TO FEDERAL LAW.

The district court's decision carved out a third troubling exception to Section 5 's preclearance requirement by accepting the State's argument that the voting changes instituted by the February 10, 1995, memorandum were exempt from Section 5 preclearance because they were necessary to comply with the NVRA.

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. [App. 8a-9a.]

The district court again ignored settled precedent of this Court in concluding that voting changes are exempt from the preclearance requirement when made to comply with a federal statute. In *Allen v. State Bd.*, this Court directly addressed whether the preclearance requirement of Section 5 applied to a "bulletin issued by the Virginia Board of Elections . . . [in] an attempt to modify the provisions of § 24-252 of the Code of Virginia of 1950. . ." so as to assure compliance with the provisions of the Voting Rights Act of 1965. 393 U.S. at 552. The *Allen* Court held that the Virginia bulletin was a covered change, rejecting Virginia's argument "that § 5 [did] not apply to

the regulation in their case, because that regulation was issued in an attempt to comply with the provisions of the Voting Rights Act." *Id.* at 565, n. 29. As the Court explained, "[t]o hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from §5 coverage - - even though it would have the effect of racial discrimination. It is precisely this situation [that] Congress sought to avoid in passing §5." *Id.*[18]

Similarly, this Court has ruled that voting changes made by covered jurisdictions in response to orders of federal courts instructing them to create a remedy for a district court's finding of a violation of the one-person, one-vote doctrine or the Voting Rights Act must be precleared pursuant to Section 5 before implementation. *McDaniel v. Sanchez*, 452 U.S. at 145-153, n. 30. Indeed, if the district court's theory were correct, most redistricting plans would not be subject to the requirement of Section 5 preclearance, because such plans are usually enacted to comply with the one-person, one-vote requirements of the Fourteenth Amendment.

In addition, the district court's conclusion is in direct conflict with the express language of the NVRA, which states that "neither the rights and remedies established by this section nor

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[18] The Board of Elections' bulletin "outline[d] new procedures for casting write-in votes," *id.* 393 U.S. at 570, and added illiteracy to the conditions already contained in a Virginia statute that specified when a person could receive assistance in casting a write-in ballot. *Id.* at 581. In addition, the facts of *Allen* show that a bulletin, like the manuals and memoranda in this case, sent from state election officials to the local officials who actually would implement the new voting procedure, is a change covered by §5 and requires submission for preclearance. The lack of apparent authority of the Board of Elections to modify a Virginia statute was not discussed in *Allen*, but it was not an impediment to this Court's decision.

any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965," 42 U.S.C. § 1973gg-9(d)(1), and further provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act," 42 U.S.C. § 1973gg-9(d)(2).[19]

This Court has refused to create sweeping exceptions to the requirements of Section 5, holding, "[t]he prophylactic purposes of the § 5 remedy are achieved by automatically requiring 'review of *all* voting changes prior to implementation by the covered jurisdictions. *McDaniel*, 452 U.S. at 151, *citing* S Rep No. 94-295, p. 15; *Presley v. Etowah County Comm'n.*, 502 U.S. 491, 509 (1992). Application of that principle here clearly requires reversal of the decision below.[20]

CONCLUSION

In attempting to "forego the preclearance process altogether," *Clark*, 500 U.S. at 659, Mississippi has relied upon several legal theories that this Court has repeatedly rejected as inimical to the effective enforcement of Section 5. Because the district court's decision is in direct conflict with this Court's long-established principles governing the application of Section 5 to voting changes made by covered jurisdictions, the Court should summarily reverse the decision of the district court and hold that plaintiffs are entitled to a declaratory judgment that the voting

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[19] Congress rejected an amendment to the NVRA that would have exempted NVRA-related voting changes from the Section 5 preclearance requirement. HR Rep. No. 9, 103rd Congress, 1st Session 1993, p. 37.

[20] In this portion of its ruling, the district court again exceeded its subject matter jurisdiction by delving into the State's motives for making the voting changes announced in the February 10, 1995, memorandum. *See* discussion of district court's limited jurisdiction in Part II, *supra* at 24-25.

changes made in the State's February 10, 1995, memorandum are covered by Section 5 and have not been precleared, leaving the issue of appropriate relief to the district court in the first instance. In the alternative, the Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

July 24, 1995

ORDER

This three-judge court, consisting of Judge E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit, and Chief Judge William H. Barbour and Judge Tom S. Lee of the United States District Court for the Southern District of Mississippi, was convened pursuant to an order of Chief Judge Henry A. Politz of the United States Court of Appeals for the Fifth Circuit, on June 19, 1995, to hear and determine the alleged violation of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, in the captioned case.

1. At the time Congress enacted the National Voter Registration Act (the "NVRA"), to be effective January 1, 1995, Mississippi operated a unified voter registration system (the "pre-NVRA system"), that is, once a Mississippi citizen registered to vote through any of the available methods or at any of the available places, as provided under the state registration system, he was eligible to vote in municipal, county, state, and federal elections. Consequently, each county in Mississippi maintained only one voter registration list.

2. The NVRA was enacted for the express purpose to encourage voter participation in federal elections. In its essence, it simplified registration for federal elections and directed that the state make federal voter registration available in state drivers license offices, state agencies providing public assistance, (and any other agencies as the state may choose or not choose), and by mail. The NVRA further allowed the state, at its option, to take measures to meld the NVRA requirements into the existing state system for registration of voters.

3. In anticipation of the effective date of the NVRA, January 1, 1995, Dick Molpus, the Secretary of State of Mississippi and the officially designated chief election official for purposes of Mississippi's compliance with the NVRA, and the NVRA Implementation Committee (the "Committee") developed an implementation plan to guide state agencies in registering voters under the NVRA. The plan, at least in part, was based on the assumption that state election laws would be amended by the Mississippi state legislature to permit citizens registering pursuant to the NVRA also to vote under state and local election laws. To this end, Molpus and the Committee developed and proposed state legislation to amend the state election laws. Also during 1994, Molpus conducted training seminars on implementation of the NVRA for Mississippi's circuit clerks, election commissioners, and state agency personnel.

4. On December 1 and again on December 14, the Secretary of State informed the United States Attorney General that his intention had been to send materials for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, only after the proposed legislation had passed. At the request of the United States Attorney General, however, he would proceed to submit

for preclearance a package containing the entire plan, prior to the passage of the state legislation.

5. On December 20, therefore, Molpus submitted to the United States Attorney General for § 5 preclearance Mississippi's plan to administratively implement the NVRA. This submission included a manual drafted by the Secretary of State listing basic changes necessary to bring Mississippi's voter registration procedures in compliance with the NVRA, including various registration forms needed for NVRA compliance and a draft of the proposed legislation that would amend Mississippi's voter registration laws so as to comply with the NVRA.

6. On January 25, 1995, the proposed Mississippi legislation, which would have qualified citizens registering under the NVRA also to vote in state and local elections, was tabled in a meeting of the Senate Elections Committee. To date, the proposed amendment to Mississippi's election laws has not been enacted. No federal statute or regulation requires Mississippi to enact such statute.

7. On February 1, the United States Attorney General granted § 5 preclearance to the plan and package submitted on December 20.

The parties dispute exactly what was precleared. Mississippi contends that the proposed state legislation, never having been enacted, was never precleared, although admittedly it was included in the § 5 submission. Mississippi contends that the United States Attorney General precleared only those changes necessary to allow Mississippi to administratively implement the NVRA for federal elections, such as Mississippi's choices regarding the agencies designated for federal registration and the methods used to purge federal voter registration lists.

The Young plaintiffs and the United States contend that the entire submission, as earlier noted, was precleared, including the proposed state legislation coordinating Mississippi's voter registration system with the NVRA.

8. At the aforementioned training seminar on the implementation of the NVRA, the offices of the Secretary of State advised at least some of the election officials in attendance that citizens registering pursuant to the NVRA would be eligible for both federal and state elections. This advice was given under

the admittedly mistaken assumption that the state legislature would enact proposed legislation changing voter registration procedures for state elections that would allow this result. Some election officials operated under this advice from January 1 through February 10. It is undisputed that between January 1 and February 10, all persons who registered pursuant to the NVRA, and who were thereupon placed on the qualified list of voters for local and state elections, were not qualified under the terms of the statutes of the State of Mississippi to vote in local and state elections. It is also undisputed that all such persons who registered only under the NVRA were removed from the list of qualified voters for local and state elections pursuant to the February 10 memorandum referred to in paragraph 9 below.

9. Sometime after January 25, the Secretary of State became aware that the legislature would not enact the proposed legislation, and thus realized that the NVRA registrants had been registered contrary to the laws of the state. On February 10, Mississippi's Assistant Attorney General issued a memorandum notifying circuit clerks and county election commissions that NVRA registrants were qualified to vote only in federal elections because the anticipated state legislation had not been enacted. The memorandum stated that NVRA registrants would be required additionally to register under the state election system to qualify to vote in state elections.

Furthermore, on February 24, the Secretary of State sent a memorandum to the state agencies that were conducting NVRA registration asking these agencies to inform potential registrants that the NVRA form would register them only for federal elections. The Secretary of State further advised these agencies that to be registered for both state and federal elections, these registrants would be required to complete either the state registration form only or this form together with the NVRA form.

10. On February 16, the United States Attorney General wrote the Mississippi Attorney General and stated that this new "dual registration system" (as reflected in the advice of the February 10 memorandum) had not received § 5 preclearance and thus was unenforceable until Mississippi received preclearance for this change. On March 9, Mississippi responded that its current

voter registration system reflected no change in voting subject to § 5 preclearance.

11. On April 20, Thomas Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, on behalf of themselves and all others similarly situated (collectively, the "Young plaintiffs"), filed suit in the United States District Court for the Southern District of Mississippi against several individuals in their official capacities as representatives of Mississippi (collectively, the "defendants"). Also on April 20, the United States filed suit against these same defendants and additionally against the State of Mississippi (also, collectively, the "defendants"). Each of these complaints alleged that the State of Mississippi effected a change subject to § 5 preclearance when, pursuant to its February 10, 1995 letter, it advised all Mississippi election officials that NVRA registrants could only vote in federal elections. These complaints further alleged that because this change had not been precleared, the change was unenforceable. Each of the complaints sought injunctive relief against the state's maintaining this "dual registration system." (In practical terms, the complaints requested this court to qualify all NVRA registrants for voting in local and state elections.) On May 30, these cases were consolidated.

12. The defendants request partial summary judgment on the claims of both the Young plaintiffs and the United States that they violated § 5 of the Voting Rights Act. Both the Young plaintiffs and the United States oppose the defendants' motion and file cross-motions for summary judgment on this issue. The United States additionally requests a preliminary injunction with regard to this issue.

13. Both the Young plaintiffs and the United States argue that before January 1, 1995, Mississippi maintained a unitary voter registration system for all elections, local, state, and federal; on January 1, that unitary system was modified in accordance with the practice adopted by the Secretary of State of including NVRA registrants within the state unitary voter rolls, i.e., that the NVRA registrants were deemed qualified to vote in local and state elections; that this change was effectively precleared one month later by the United States Attorney General on February 1; that on February 10 the State of Mississippi withdrew the

practice started on January 1 of qualifying NVRA registrants for local and state elections; and that election officials thereafter were required to maintain a dual system of voter registration, i.e., a list of voters eligible for all elections and a second list of voters eligible only for federal elections (the NVRA registrants). The plaintiffs, including the United States, argue that Mississippi failed to preclear this change, effected on February 10, which converted a unitary system of voter registration into a dual system of voter registration.

14. The defendants argue that Mississippi's voter registration system for state elections has remained unchanged. The defendants contend that under the NVRA the federal government merely created an additional method for registering voters for federal elections only. Consequently, the NVRA does not affect state election laws. The defendants, in effect, argue that the dual registration system was enacted by Congress through the NVRA, not by any action of the State of Mississippi. The defendants admit that some state election officials erroneously qualified NVRA registrants for local and state elections, but contend that these officials acted contrary to state law. Thus, on February 10, the state simply acted to correct a violation of law and to conform official conduct with requirements of statutory law. The defendants argue, therefore, that Mississippi was not required to obtain preclearance from the United States Attorney General to cease misguided conduct contrary to its statutes.

15. The precise issue before this three-judge court is whether the February 10 letter, which effectively required the maintenance of two voter registration lists, constitutes a change subject to preclearance by the United States Attorney General. Practically speaking, the underlying issue is simply whether Mississippi is required to allow NVRA registrants to vote in state elections, even though not qualified under state voter eligibility statutes, because the office of the Secretary of State promulgated advice, which was followed in some instances, that NVRA registrants would be qualified for all elections pursuant to proposed and anticipated, but never enacted legislation.

We find and conclude as follows:

16. Prior to the effective date of the NVRA, Mississippi maintained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections--local, state, and federal. Miss. Code Ann. § 23-15-1 et seq. (1972). These state statutes providing for the qualification of Mississippi voters are valid under all applicable state and federal law. When Congress passed the NVRA, it made explicit that the NVRA applied only to voters in federal elections. The NVRA did not require that states enact laws that would provide NVRA registrants the right to vote in state and local elections, and Mississippi was under no obligation to pass a law to that effect.

17. The Secretary of State has no authority or power under Mississippi law to effectuate a change in the election laws contrary to legislative enactments. The Secretary of State (and the Committee), however, proposed legislation that would permit NVRA registrants to vote in local and state elections, as well as federal elections. The Secretary of State assumed that such legislation would be enacted in due course. Therefore, in an effort to implement the proposed state plan on January 1, 1995, the effective date of the NVRA, the Secretary of State, although unauthorized under state law, advised certain election officials to qualify NVRA registrants for state and local, as well as federal elections. A few thousand (the record is unclear on the precise number) citizens were registered under NVRA procedures between January 1 and February 10 under the assumption of eligibility for all elections.

18. At the instance of the United States Attorney General, the Secretary of State submitted for preclearance its total package implementing the NVRA, including the proposed legislation that was never enacted, but also administrative changes that the Secretary of State was authorized to make under both the NVRA and existing state law. On February 1, the Attorney General precleared the package submitted by the Secretary of State. It is clear to us that the unenacted legislation was not precleared because under the express terms of the applicable regulations, the United States Attorney General "will not consider on the merits...[a]ny proposal for a change affecting voting submitted prior to final enactment or administrative decision." 28 C.F.R. §

51.22 (1994). There is nothing in the record to indicate the United States Attorney General disregarded these regulations; we thus assume she acted according to law. Accordingly, it is equally clear--and this does not appear to be in dispute--that the contents of the package regarding only administrative decisions of the state have been precleared.

19. We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General. Practically speaking, any other conclusion would be absurd. There is no evidence of ratification here. For example, there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month long practice on the part of some election officials to qualify voters contrary to applicable state law. As we have indicated, no one, including the Secretary of State himself, contends that the Secretary of State possesses the authority to override the election statutes of the State of Mississippi. Once it became clear that the legislature was not going to enact the proposed legislation, Mississippi's Attorney General and Secretary of State took prompt action to comply with the state statutes. Thus, the act of the state to correct a misapplication of law that it has not ratified is not a change subject to § 5 preclearance.

20. Furthermore--although the argument has not been specifically raised in the pleadings or briefs but was alluded to only in the last minutes of oral argument before this court and in the unsolicited last minute brief of the Young plaintiffs--the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance. The NVRA records are maintained at the instance of the federal government and pursuant to federal law. The fact is that NVRA voters in Mississippi can only vote in federal elections. The further fact is that this limited right is a creation of federal legislation. In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records,

is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General.

It is therefore

ORDERED, ADJUDGED, and DECREED

That the Motion for Partial Summary Judgment filed by the defendants is GRANTED.

That the Cross-motions for Summary Judgment filed by the Young plaintiffs and the United States are DENIED.

That the Motion for Preliminary Injunction filed by the United States is DISMISSED as moot.

That Count II of the Young plaintiffs' complaint and Count I of the United States complaint are DISMISSED.

SO ORDERED this the 24th day of July 1995.

/s/ E. Grady Jolly
United States Circuit Judge

/s/ William H. Barbour, Jr.
United States District Judge

/s/ Tom S. Lee
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

February 9, 1996

FINAL JUDGMENT

Pursuant to Rule 58, Fed. R. Civ. P., this Court hereby enters final judgment against the United States and the Young plaintiffs in accordance with the Order issued on July 24, 1995, granting Defendants motion for partial summary judgment against the United States on Count I of its Complaint and against the Young plaintiffs on Count II of their Complaint, and in accordance with the Order of September 7, 1995, denying the United States' motion to alter or amend. The Court incorporates

into this judgment the orders issued on July 24, 1995, and September 7, 1995.

ENTERED this 9th day of February, 1996.

/s/ E. Grady Jolly
United States Circuit Judge

/s/ William H. Barbour, Jr.
United States District Judge

/s/ Tom S. Lee
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:95CV197(L)(N)

THOMAS YOUNG, et al., Plaintiffs

v.

KIRK FORDICE, et al., Defendants

consolidated with

Civil Action No. 3:95CV198(L)(N)

UNITED STATES OF AMERICA, Plaintiff

v.

STATE OF MISSISSIPPI, et al., Defendants

April 8, 1996

NOTICE OF APPEAL OF PLAINTIFFS YOUNG, *et al.*, TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the plaintiffs in *Young, et al., v. Fordice, et al.*, Civil Action No. 3:95CV197(L)(N), Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, hereby appeal to the United States Supreme Court from the final judgment of the three-judge district court, entered on February 9, 1996. This judgment finalized the order entered on July 24, 1995, which granted Defendants' motion for summary

judgment against the Young plaintiffs on Count II of their complaint and against the United States on Count I of their complaint and the order of September 7, 1995, which denied the United States' motion to alter or amend the July 24, 1995, order. The Young plaintiffs' appeal is taken pursuant to 42 U.S.C. § 1973c.

Respectfully submitted,

/s/ J. William Manuel
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APPENDIX D

[DOJ logo] **U.S. Department of Justice**

Civil Rights Division

DLP:MAP:DHH:tlb
DJ 166-012-3
94-4505

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

February 1, 1995

Constance Slaughter-Harvey, Esq.
Assistant Secretary of State, Elections
and General Counsel
State of Mississippi
P.O. Box 136
Jackson, Mississippi 39205

Dear Ms. Slaughter-Harvey:

This refers to the submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of the plan to implement administratively the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg et seq., as described in publications of the Office of the Mississippi Secretary of State ("The National Voter Registration Act" (November 1994) and "The National Voter Registration Act: Agency Registration Procedures") and as subsequently clarified by the January 30, 1995, letter from your office. The implementation plan includes the following changes to voter registration and related procedures in the state:

1. voter registration at state agencies, including the offices of the Department of Human Services, the Department of Health, WIC Independent Clinics, Medicaid, and the Department of Rehabilitation Services;

2. the registration procedures to be followed by the agencies specified in paragraph 1, and the agency registration/declination form;

3. the designation of armed forces recruitment offices as voter registration locations;

4. voter registration at driver's license offices by simultaneous application, and the application forms (a combined voter registration/driver's license application form and a combined voter registration/license renewal form);

5. modification of the mail-in registration form including discontinuing the attesting witness requirement;

6. the deadline for transmitting voter registration applications from public assistance offices and driver's license offices to circuit clerks;

7. modification of voter registration purge procedures, including discontinuing the optional "four-year purge," prohibiting purging because a registrant has not voted for a period of time or has moved within the county of registration, and altering the procedures for purging registrants who may have moved outside their county of registration (including an ongoing program where each county may utilize either the postal service's National Change of Address program or a mass mailing of postcards to all registrants, sending address confirmation notices and the form to be used in that regard, use of an inactive registration list, and cancelling the registration of those on the inactive list who fail to vote or appear to vote within two subsequent federal elections or fail to otherwise have contact with election officials);

8. implementation of the NVRA's "fail-safe" voting requirements; and

9. modification of record keeping and reporting procedures and requirements.

We received your submission on December 20, 1994; supplemental information was received on January 13, 24, 26, and 31, 1995.

The Attorney General does not interpose any objection to the specified changes. However, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43). In addition, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In that regard, the granting of Section 5 preclearance does not preclude the Attorney General or private individuals from filing a civil enforcement action pursuant to Section 11 of the NVRA, 42 U.S.C. 1973gg-9.

In addition, the preclearance of those portions of the administrative implementation plan that enable or permit the state or its political subdivisions to adopt future voting changes does not constitute preclearance of those future changes and, accordingly, Section 5 review will separately be required when such changes are adopted or finalized. See 28 C.F.R. 51.15. The matters for which Section 5 review will be required include (but are not limited to): each county's selection of the procedure to be utilized in its program for identifying registrants who have moved outside their county of registration; and any change in the location or hours of public assistance offices that offer voter registration or driver's license offices. Moreover, any future changes in the state's NVRA implementation procedures (e.g., through the adoption of state legislation or the modification of precleared forms) will be subject to Section 5 review.

We further note that it appears that the State of Mississippi and/or its counties may need to address several additional matters in order to come into full compliance with the requirements of the NVRA and the Voting Rights Act, including the following:

- Section 7(a)(3) of the NVRA requires each state to designate government or nongovernment offices to serve as voter registration agencies in addition to the mandatory agencies specified in Section 7(a)(2); your submission does not address this issue. Also, the mandatory agencies specified in Section 7(a)(2) include "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," and we understand that your office will be examining the question whether certain offices that serve persons with nonphysical disabilities have not been designated as voter registration agencies.

- As you are aware, six of Mississippi's counties (Jones, Kemper, Leake, Neshoba, Newton, and Winston) are subject to the minority language requirements of Section 203 of the Voting Rights Act, 42 U.S.C. 1973aa-1a, with respect to Native Americans who speak the Choctaw language. Accordingly, procedures to implement the NVRA in these counties must be conducted in accordance with these requirements. See the Attorney General's minority language guidelines, 28 C.F.R. Part 55.

Finally, we note that the November 1994 manual indicates that individual counties may continue to conduct voter re-registration programs under the NVRA, so long as Section 5 preclearance is obtained. However, to the extent that a re-registration program would result in persons being disqualified from voting in elections for federal office for reasons other than those permitted by Section 8(a) (3) and (4) of the NVRA, that program would not be permissible. That section specifies that a person may not be removed from the registration list except at the registrant's request, because of a criminal conviction or mental incapacity as provided by state law, the registrant's death, or a change in residence pursuant to the procedures specified in Section 8. It further is our view that any re-registration program that currently is ongoing is subject to this limitation, irrespective of whether it may previously have been precleared under Section 5.

If you or any county election officials have any questions about any of these matters, please telephone David H. Hunter, an attorney in the Voting Section, at 202-307-2898.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

[By: /s/ John K. Tanner]

John K. Tanner
Acting Chief, Voting Section

APPENDIX E

Memorandum

To: Mississippi Circuit Clerks
Chairman, Mississippi County Election Commissions

From: Phil Carter, Assistant Attorney General
Reese Partridge, Staff Attorney, Secretary of State's Office

Date: February 10, 1995

Subject: Implementation of the National Voter Registration Act of 1993 (NVRA)

Purpose of this memorandum. As all of you are aware, the National Voter Registration Act took effect nationwide on January 1, 1995. NVRA is a federal law which mandates certain changes in the way the states must register voters for federal elections, as well as the manner in which voter registration rolls must be purged for federal elections.

State legislation which would provide a common registration system for state and federal elections has apparently died in the Mississippi Legislature. The purpose of this joint memo from the Mississippi Secretary of State's Office and the Mississippi Attorney General's Office is to offer additional direction to circuit clerks and county election commissioners as to how they should proceed.

In particular, we will address three areas: (1) Notifying voters registered under NVRA that they cannot vote in state or municipal elections; (2) Designating on the voter registration rolls

voters registered under NVRA; (3) Purging voter registration rolls this year; and (4) Reporting requirements. First, however, we have provided some background on the current situation regarding NVRA.

Background. Legislation was drafted at the direction of the Governor's NVRA Implementation Committee, which was named on December 15, 1993, in Executive Order No. 739. The draft legislation was completed in August of 1994 and distributed to all members of the Implementation Committee, including the representatives of the Circuit Clerks Association and the Election Commissioners Association of Mississippi. The Senate Elections Committee conducted a public hearing on the draft legislation on November 16, 1994, and all indications were that the legislation would be top priority of that committee.

However, Senate Bill 2539, the proposed legislation which conformed state law to NVRA was tabled at a meeting of the Senate Elections Committee on January 25, 1995. Tabling of a bill is an action which generally means the legislation is dead. Although the Legislature can revive SB 2539 by suspending its procedural rules, it presently appears unlikely that the Legislature will do so.

Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections.

Notification of voters registered under NVRA. Anyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections. It is important, therefore, that they be informed that they presently are only authorized to vote in federal elections. Additionally, they should also be given a reasonable opportunity to register for state elections.

Several circuit clerks have already begun notifying voters registered under NVRA that they must also register by

completing a state mail-in voter registration form, or, register in the courthouse in order to be eligible to vote in state elections.

The position of the Secretary of State and the Attorney General is that all voters registered under NVRA should be similarly notified and given the opportunity to register for state elections.

Accordingly, the Secretary of State's office is offering to notify by mail all voters registered under NVRA and present them the option of either visiting their circuit clerk's office and registering, or, completing a state mail-in voter registration form to be forwarded to their circuit clerk. The Secretary of State's office will bear the postage and printing cost for this effort. In order to complete this mailing, circuit clerks will be asked to provide to the Secretary of State a list of names and mailing addresses of all voters registered under NVRA. Clerks may, of course, elect to provide such notification themselves.

Designating voters registered under NVRA on the voter registration rolls. Voters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

Purging voter registration books during 1995. Since there are no federal elections scheduled in 1995 and it appears that there will be no state legislation that will affect current state purging laws, there is no legal requirement that the NVRA purging procedures be implemented this year. However, any voter whose name is purged under state law for a change in residence remains eligible to vote in the federal elections until the procedure prescribed in the NVRA has been completed.

To purge <u>for federal elections</u> the "confirmation cards" that are required by NVRA must be sent to any person who has moved

before placing the voter on the NVRA inactive list or purging the voter. For example, if an election commission makes a factual determination that a voter has moved from the county, they must send the voter a "confirmation card" to the voter's last known address before they can place the voter's name on the inactive list. If the voter returns the confirmation card, they may immediately change his or her last name. Otherwise, the election commission must wait two federal general elections before purging the voter's name.

The "ongoing program" which is required by NVRA for federal elections must still be conducted by county election commissions. Therefore, counties must still employ either the National Change of Address (NCOA) system or "mass mailing" method discussed in the NVRA Information Manual.

Reporting requirements. In order for the Secretary of State's Office to complete the 1995 NVRA Report, the circuit clerks of each county must provide the total number of voters registered as of the 1995 General Election to the Secretary of State's Office not later than March 3, 1995.

In order to comply with the requirements for the March 31, 1997 Report, more detailed information will be required. You may obtain a free copy of the Rules and Regulations outlining the reporting requirements from the Federal Election Commission (FEC) by calling 1-800-424-9530.

Conclusion. NVRA is a federal law which must be implemented in Mississippi. While the failure to pass state legislation will cause additional difficulties for both election administrators and citizens who register under NVRA, both the Secretary of State and the Attorney General offer their assistance in resolving any questions you may have.

APPENDIX F

[DOJ seal] **U.S. Department of Justice**

Civil Rights Division

DLP:MAP:DHH:tlb
DJ 166-012-3
95-0418

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

February 16, 1995

Sandra Murphy Shelson
Special Assistant Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Shelson:

We have been advised by the Mississippi Secretary of State's office that the State of Mississippi has determined that in implementing the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg-1 through 1973gg-10, it will institute a dual registration and voter purge system under which those persons who are on the registration list pursuant to the provisions of the NVRA will be eligible to vote only in elections for federal offices, while persons who are on the registration list pursuant to the laws enacted by the state will be eligible to vote both in elections for federal offices and in elections for state and local offices.

Our review of this matter indicates that the implementation of this dual voter registration and purge system has not been submitted for review under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. In this regard, we note that while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that

submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1. Accordingly, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes in procedure which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.2, 51.10, 51.12, and 51.13).

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Mississippi plans to take concerning this matter. If you have any questions, you should call Voting Section attorney David H. Hunter at (202) 307-2898. Refer to File No. 95-0418 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/ Elizabeth Johnson

Elizabeth Johnson
Acting Chief, Voting Section

cc: Constance Slaughter-Harvey
Assistant Secretary of State, Elections
and General Counsel

APPENDIX G

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without

such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

APPENDIX H

Section 8 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-6, entitled REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION, provides:

> (b) CONFIRMATION OF VOTER REGISTRATION. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--
>
> (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and
>
> (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

Section 11 of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg-9, entitled CIVIL ENFORCEMENT AND PRIVATE RIGHT OF ACTION, provides:

> (d) RELATION TO OTHER LAWS.--(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).
>
> (2) Nothing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

Supreme Court, U.S.
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(2)

No. 95-2031

In The

Supreme Court of the United States

October Term, 1995

THOMAS YOUNG, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

MOTION TO AFFIRM

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ISSUES PRESENTED

This is, ostensibly, a voting rights case. The State of Mississippi implemented the requirements of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg through 1973gg-10, (NVRA), by simply doing what the NVRA required. The State, as required by the Act, established an additional voter registration network whereunder persons could register to vote in federal elections at places such as welfare offices and drivers' license bureaus. The State did not change its existing State voter registration system established by State law. The appellants contend that the State, by merely following the requirements of the NVRA, chose to implement a "dual" system of registration, and that this "change" from the pre-existing unitary system of registration required preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The appellants also contend that a "change" occurred because some local officials who believed, incorrectly, that State law would be changed to conform to the requirements of the NVRA briefly put NVRA registrants on State voter rolls.

The primary issue is whether the District Court erred in ruling that the State of Mississippi had not made a voting change of the sort normally subject to preclearance under Section 5 of the Voting Rights Act, when it did not change State voter registration and purging provisions to conform with the voter registration and purging provisions of federal elections contained in the NVRA.

ISSUES PRESENTED – Continued

A secondary issue is whether the District Court erred in ruling that unauthorized, temporary, and unratified acts of State and local officials do not create a "change" for Section 5 purposes.

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

(1) Thomas J. Young, Richard L. Gardner, Elanor Faye Smith, and Rims Barber, plaintiffs, appellants herein.

(2) Kirk Fordice, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, Dick Molpus, in his capacity as Secretary of State of the State of Mississippi, and Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services, defendants, appellees herein.

(3) Contrary to representations made by the appellants, the United States and the State of Mississippi were not parties to this proceeding. They were parties to a separate consolidated proceeding. The judgment in that separate proceeding was initially appealed, but that appeal was dismissed by the United States.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the judgment of the District Court. The questions sought to be raised by the appellants are so insubstantial that full review by this Court is unnecessary. The District Court's decision presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

A. Mississippi's Voter Registration System

Before the enactment of the NVRA and subsequently, the State of Mississippi has operated one of the most accommodating voter registration systems in the nation. Pursuant to Miss. Code Ann. §23-15-35, a qualified individual may register one time and be eligible for every local, state, or federal election. This was accomplished by cross-deputizing county and city clerks for purposes of registration. There is no requirement that anyone register more than one time in order to be fully registered to vote. Because of this section, an individual may complete his all-purpose registration at the office of his circuit clerk or at the office of the municipal clerk of his city, town, or village. Pursuant to Miss. Code Ann. §23-15-47, that individual is not even required to travel to any office in order to register. He may simply pick up the telephone or mail a request to any office of any registrar, and request a voter registration form. He can then mail the form back to the office of his choosing and be fully registered for all elections.

At one time the State did have a dual registration system whereunder residents of municipalities were *required* to register twice in order to be eligible to vote in local and state elections. The first registration had to be with the county registrar. In order to vote in municipal elections voters then had to register with the municipal registrar. This condition was described in *Miss. State Operation Push vs. Allain*, 674 F.Supp. 1245 (S.D. Miss. 1987). After *Push* the State responded by going well beyond the measures needed to address the concerns set out by the Court's order. By virtue of the mail-in provisions, anyone who wants to assist in voter registration drives is empowered to get a stack of mail-in forms and distribute them freely and act as a witness for the potential registrants. The previous requirement, formerly set forth in §23-15-47, that only the county registrar or his deputy could perform this service has been abolished. Pursuant to §23-15-47 the Office of the Secretary of State is required to have registration forms available in bulk and to distribute them in bulk to any person or organization requesting them. The same forms must be distributed in bulk without charge to the Commissioner of Public Safety, and made available in bulk to all public schools, any private school that requests them, and all public libraries.

In the event any form which is mailed in is in any way insufficient, the county registrar is required by §23-15-47 to contact the individual and get the necessary curative information and register the individual if he is eligible. If the registrar is unable to cure the defect the registrar must give the applicant written notice of rejection with the reason for the rejection and inform the

applicant of his right to attempt to register in person or to reapply by mail. Section 23-15-37 requires extended office hours for the office of the county registrar immediately prior to the registration deadline for county and state elections, and for extended office hours for the city registrar immediately prior to the registration deadlines for city elections. The same statute empowers the county registrar to visit any location in his county for the purpose of registering voters not less than 30 days before an election.

Section 23-15-37 even requires the registrar or his deputy to visit, upon request, any disabled person and provide that person with an application for registration. All the disabled person need do is execute the application in the presence of the visiting registrar or his deputy.

As stated earlier, the Mississippi system is among the most accommodating systems in the nation. All of these code sections have been precleared by the Attorney General. The system described above is unchanged by anything contained in the NVRA or the State's implementation of the NVRA. The State administers the same system of voter registration today that it administered prior to implementation of the NVRA on January 1, 1995. As will be shown below, the NVRA merely added an additional method for registration for *federal* elections. There exists no dual registration system of the sort addressed in *Push*. There is no *requirement* that anyone register twice in order to be universally registered. Mississippi has not created a "dual" system of registration. With implementation of the NVRA a separate system of registration for federal elections exists, but it was the United States, not Mississippi, which created the additional method of registration.

B. Facts Relating To Implementation Of NVRA

During 1993, Mississippi began planning for its January 1, 1995, implementation of the requirements of the NVRA. On December 15, 1993, Governor Kirk Fordice issued an Executive Order creating a committee to plan for implementation and naming the Mississippi Secretary of State as the official responsible for coordinating State efforts. During 1994, the committee held various meetings and generated plans and materials designed to make implementation go smoothly. One of the things the committee proposed was legislation designed to change State voter registration statutes to fit with NVRA requirements. From time to time an Assistant Secretary of State made information mailings of material to officials with the U.S. Department of Justice.

On December 20, 1994, officials of the Department of Justice suggested in a telephone conversation with an attorney with the Office of the Secretary of State that the matters previously outlined in informational mailings be submitted for preclearance. In response the Office of the Secretary of State wrote the Department and requested the Department to consider all the prior informational mailings as one large undifferentiated Section 5 submission. The Secretary of State submitted supplemental information on January 13, 24, 26, and 31, 1995. The Assistant Secretary of State, believing that State statutes would be changed, took it upon herself to tell circuit clerks who attended various meetings that they should begin enrolling NVRA registrants on State voter rolls. Approximately 31 of the 82 county circuit clerks followed

this advice for a short time from January 1, 1995, until correct advice was sent them on February 10, 1995.

The "submission", together with supplements, contained far more than merely the agency and purging choices made by the State. The "submission" contained proposed legislation, an NVRA information manual, proposed registration forms, model office procedures, updates, status reports, summary of legislative efforts, reports of Committee hearings, summaries of Committee discussions, summaries of community outreach programs, and reports of training programs, Summ.Judg.Mot.Ex. "A". This collage was promptly precleared by the Attorney General on February 1, 1995, Summ.Judg.Mot.Ex. "B". Nothing in the "submission" ever represented that the State had changed its registration requirements for State elections. The Attorney General's preclearance was not a preclearance of any accomplished change in Mississippi registration requirements for State elections. The appellants contend, however, that officials with the Secretary of State and the U.S. Attorney General's office both believed that the Legislature would enact reconciling legislation. The appellants further contend, therefore, that the informational mailings implied that the forms and procedures set forth in the "submission" would eventually apply to State registration as well as federal registration. The appellants further contend, incredibly, that since the Attorney General precleared changes she believed were implied in the "submission" or which she expected would occur in State requirements, those imagined changes in State requirements now exist and represent the extant precleared condition of Mississippi law.

On January 25, 1995, seven days before the "preclearance", the Mississippi Legislature rejected, in committee, the proposed legislation which would have amended Mississippi's registration laws to conform with the NVRA. On February 10, 1995, officials with the office of the Secretary of State and the Mississippi Attorney General wrote a memorandum to circuit clerks and chairmen of county election commissions across the State advising that the proposed legislation had died and advising that Mississippi law for State and local elections remained unchanged. The appellants contend that this memorandum effectively enacts an unprecleared "change" in State law from the pretended "changes" in State registration requirements which were "precleared" on February 1, 1995. In reality, the February 10 memorandum merely states the obvious point that there has been no change in State law. The appellants' Section 5 theory of liability is predicated entirely on the erroneous proposition that some change in State law was accomplished by the informational mailings and the "preclearance" that followed, and that the February 10 memorandum changed the law back to its previous condition without benefit of additional preclearance.

C. Proceedings In The District Court

Simultaneously on April 20, 1995, the appellants and the United States filed separate Complaints asserting that the appellees were administering unprecleared changes in State voter registration law or practice. On May 30, 1995, the two cases were consolidated. On July 24, 1995, after cross-motions for summary judgment, briefing, and

oral argument, the District Court entered its Order finding that no change in Mississippi law or practice had occurred and that, accordingly, no preclearance was required, and there exists no Section 5 violation. The Court also found that the misguided and unratified acts of the Assistant Secretary of State did not operate to change State law, and that subsequent curative acts taken by other State officials did not amount to a "change" requiring preclearance.

Final judgment was entered on February 9, 1996. On March 8, 1996, both the United States and the Young appellants filed their separate Notice of Appeal. On June 11, 1996, the United States filed its Motion to Dismiss Appeal. Its appeal was dismissed by order of the District Court on June 12, 1996. The Young appellants are the only appellants herein.[1]

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[1] Surprisingly, as the appellees' brief was being prepared for shipment to the printer, the United States filed a brief in this action. After dismissing its case the United States now takes the position that it is a party to this proceeding within the meaning of Rule 18.2. The appellees have had no notice that the United States considered itself a party to this proceeding or that the United States intended to attempt to participate. Time constraints do not allow the appellees a full opportunity to reply to the United States' contention that it has Rule 18.2 standing herein, but it is clear that the *separate* proceedings prosecuted by the United States and the *Young* plaintiffs were merely consolidated – they were not merged. The proceeding to which the United States was a party, within the meaning of Rule 18.2, was dismissed at the request of the United States. Its behavior is confused at best. At worst its behavior has been calculated to mislead the appellees and gain an advantage in this litigation thereby. In either event the United States' attempt

ARGUMENT

A. The Ruling South To Be Reviewed Is Fact Intensive With No Precedential Value

The District Court decision represents primarily a finding of fact that in implementing the NVRA the State of Mississippi did not make a "change" to its law or practices regarding State voter registration. Contrary to assertions made by the appellants, the District Court did not rule that changes were made, but that preclearance should be excused. The District Court properly understood that if changes had been made, those changes would have been subject to preclearance. There has been no misapplication of law in this proceeding. This Court should not take this case on full review merely to determine whether the District Court committed some error in its findings of fact. It is extremely unlikely that the peculiar facts of this case are capable of repetition. No useful purpose will be served by having this Court dedicate its resources to this case. The ultimate facts herein are that the NVRA relates only to federal elections and the State of Mississippi did not change its laws to incorporate the features of the NVRA. This is a condition contemplated by the NVRA. Examining the appellants' strained theories regarding the carelessness of a mid-level State functionary simply is not worth the while of this Court.

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to participate as a party in this appeal is unworthy of the great offices which prepared the brief. The brief should be disregarded.

B. No Reconciliation Of State Law With NVRA Provisions Was Required Or Accomplished

There are two broad precepts that underlie the analysis of the appellants' theory of liability. First, States are free to maintain requirements for voter registration for State elections separate from and different from those requirements imposed by the federal government for federal elections, *see, Oregon vs. Mitchell,* 400 U.S. 112 (1970) (States free to maintain different voting age requirement than that required for federal elections by the federal Government). Second, only State-initiated changes in voting standards, practices, or procedures are required to be submitted for preclearance under Section 5 of the Voting Rights Act, *see, Beer vs. United States,* 425 U.S. 130 (1976).

The NVRA is federal legislation, and as such does not require preclearance to be effective. As pointed out above, there are certain choices that States may make in implementing the Act which may require submission for preclearance for those States covered by Section 5. The States' choices regarding discretionary agencies which will be utilized in implementation, and the States' choices regarding purging procedures may need to be submitted for preclearance. The package of materials submitted to the Attorney General by the Secretary of State included Mississippi's choices of discretionary agencies and procedures for purging. These choices were precleared on February 1, 1995. Beyond this there were no State-initiated changes in standards, practices, or procedures which needed preclearance consideration. All the other items contained in the informational mailings/submission were superfluous for Section 5 purposes.

The major pretense of the appellants' position is that changes to the State's registration requirements were accomplished. An example of this is found in the Attorney General's preclearance letter of February 1, Summ.Judg.Mot.Ex. "B". The Attorney General expressed no objection to two items contained in the proposed legislation notwithstanding the fact that that proposed legislation never got out of committee. The first item in the proposed legislation eliminated the attesting witness requirement to the mail-in registration form. The second item dealt with purging requirements. The proposed legislation would have eliminated the State provision allowing the purging of the names of any voters who had not voted for four years. Neither of these items could be changed administratively. Each would have required legislative action. In purporting to preclear these items as part of the *proposed* legislation the Attorney General violated Department of Justice regulation, 28 C.F.R. §51.22 which expressly provides that "[t]he Attorney General will not consider on the merits: (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision".

More generally, the appellants posit that the entire submission was designed to preclear a single structure for reconciled registration for State and NVRA purposes. The idea of reconciled registration was never adopted by the State and could not, therefore, have been submitted by any State official or precleared by the Attorney General. The idea that a reconciled registration system was submitted and precleared is what is contrasted by the appellants with the February 10 memorandum for purposes of constructing the argument that a second

unprecleared change has occurred and that a dual system of registration has resulted therefrom. The District Court quite correctly found, as a matter of fact, that State law never changed and that the pretended reconciliation never occurred.

C. Unauthorized And Unratified Acts Of A State Official Do Not Constitute A Change In State Law

The appellants contend that the erroneous advice given by an Assistant Secretary of State regarding the placing of NVRA registrants on State voter rolls, and the fact that some circuit clerks followed that advice for a period of a few weeks, established a benchmark for measuring retrogression notwithstanding the fact that the mistake was temporary and contrary to State law. This conclusion is built on several false premises.

The appellants begin with the mistaken notion that the Governor's Executive Order 739 bestowed the Secretary of State with greater authority than was actually the case. The appellants refer to the Secretary of State as the chief election official for purposes of NVRA compliance. This was the *title* given the Secretary of State, but the extent of his responsibility and authority was clearly defined in the Executive Order as "the chief state election official, who shall be responsible for *coordination of state responsibilities* under the Act." (emphasis added). This definition and limitation of responsibility and authority is prescribed and required by 42 U.S.C. §1973gg-8.

Clearly, the executive order did not designate the Secretary of State as an election czar with the power to

supplant the legislature with regard to matters relating to elections, nor did it (or could it) give the Secretary of State the power to dictate changes in State registration or purging requirements. The appellants do not attempt to explain how such a transfer of power could be accomplished under State law. They also do not seem concerned that such a transfer of power relating to elections would, itself, require preclearance before such new authority could be exercised. The appellants understandably try to elevate the role of the Secretary of State to bolster the false notion that actions of the Secretary of State, or his assistant, represent the actions of the State of Mississippi as a body politic and that the Assistant Secretary of State had authority to submit matters which would change State law.[2]

The appellants next contend that a benchmark was established notwithstanding the temporary and illegal nature of the "practice" of placing NVRA registrants on state voter rolls. The appellants rely primarily on *Perkins vs. Matthews*, 400 U.S. 370 (1971) in support of this position. In *Perkins* the City of Canton chose to elect its aldermen by wards contrary to State law requiring at-large elections. When the City of Canton attempted to return to at-large elections, citing State law, it was determined that a benchmark had been established regardless of the requirements of State law. *Perkins* does not control

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[2] The notion that the Assistant Secretary of State had authority to submit proposed changes to State law is refuted by the proposed legislation itself. Section 22 of the proposed legislation expressly directs that the Mississippi Attorney General would make the necessary submission if the legislation were adopted.

here. In *Perkins* the City of Canton acted *qua* City of Canton. The body politic made its choice and implemented that choice as the choice of the City. This Court correctly found that the political entity had consciously established a practice that served as a benchmark. In the present case the body politic is the State of Mississippi. The State has not made or implemented a practice of placing NVRA registrants on State voter rolls. The political entity, the State, consciously rejected the proposition through its legislative process. Neither the mistaken advice of the Assistant Secretary of State nor the temporary following of that advice by circuit clerks represents a policy choice of the State.

A much more analogous case is *United States vs. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). There, three poll commissioners engaged in a pattern of buying votes. The poll commissioners would enter the polling booths with voters and cast the voter's ballot in the manner of the poll commissioners' choosing. The voter would then receive payment. The United States filed suit claiming that this practice was "an unapproved change in the state's procedure for assisting voters", *id.*, at 861. The Court found that the practice did not constitute the action of the State, but, rather, was merely the action of errant officials. The Court stated clearly that

> [a]lthough the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of §5, we conclude that these actions do not constitute a change that the *state has enacted or sought to administer* within the meaning of that section.

> We do not dispute that the actions of the three poll commissioners constitute actions of the state for certain purposes. (reference omitted) But one would not normally conclude that a state "enacts or administers" a new voting procedure every time a state official deviates from the state's required procedures. The common sense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned, and we think "shall seek to . . . administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the *state governing body*. (underlined emphasis added; italicized emphasis supplied), *id.* at 864

Neither the State nor any State governing body enacted, administered, or implicitly approved the errant advice given by the Assistant Secretary of State. As stated earlier, the Secretary was granted no extraordinary power or authority relating to elections by reason of Executive Order 739. The actions of the Assistant Secretary of State were those of a mid-level functionary who anticipated incorrectly. The ruling in *Perkins* is inapposite. Here, the body politic has not made a change with regard to State registration procedures. No benchmark was established by the erroneous and temporary enrolling of NVRA registrants on state voter rolls. The February 10 memorandum did not change *State* procedure regarding State registration. The February 10 memorandum is not a "change" within the meaning of section 5 and does not constitute retrogression. As stated in *Saint Landry Parish*, "[s]urely Congress did not intend the Attorney General and the district court for the District of Columbia to waste their

time considering voting procedures that a state does not wish to enact or administer." *id.*, at 864.

The appellants have also cited *Lockhart vs. United States*, 460 U.S. 125 (1983), in support of their theory that a benchmark was established between January 1 and February 10, and that the February 10 memorandum changed State law and amounts to a retrogression. *Lockhart* presents a circumstance which, in principle, is indistinguishable from *Perkins*. The City of Lockhart, Texas, acting as a political entity, changed its form of government in a manner which may have been contrary to Texas law. A subsequent attempt to make another change to a different form resulted in the same ruling as was made in *Perkins*. The language quoted by appellants merely reflects the rule in *Perkins*. The Court's use of the words "without regard for the legality under state law of the practices already in effect", merely reflects an ambiguity in Texas law regarding which statutes applied to this particular city.

D. Implementing The NVRA As Written Does Not Not Amount To A "Choice" Requiring Preclearance

In its unauthorized brief the United States begins its examination of this matter with a dramatically incorrect and unsupported proposition. The United States recognizes, as it must, that the NVRA applies to federal elections only and the Act does not require the States to reconcile their State requirements with the NVRA.

Accordingly, a State could fulfill its NVRA responsibilities simply by having its agencies make proper registration forms available under proper circumstances and carrying NVRA registrants on voter rolls as registrants eligible to vote in federal elections. This, along with purging requirements peculiar to those registrants, is what federal law requires. The United States contends, however, that simply doing what federal law requires amounts to a "choice" that requires preclearance. The United States asserts that by doing the things required by the NVRA the State has "chosen" not to do more. Specifically, the State has "chosen" not to reconcile State requirements with the NVRA. The United States contends that this "choice" is one which must be approved by federal authority before it can be effective if the jurisdiction is covered by Section 5.

Assuming, safely, that the United States would consider such a "choice" to amount to a State implemented retrogressive dual registration system, it is a virtual certainty that a covered jurisdiction such as Mississippi could never "choose" to do less than conform its State laws to the NVRA. The effect of this would be, of course, to cede complete authority over State registration laws to the federal government. Covered jurisdictions could not "opt out" and decouple State registration requirements from NVRA requirements. Succeeding Congresses could amend and enlarge covered jurisdictions' NVRA requirements without regard to local concerns or needs. The United States offers no hint of authority contained in the NVRA, the Voting Rights Act, or elsewhere to support this extreme position.

This approach of bootstrapping Section 5 and the NVRA in order to advance a policy of forcing changes to State registration was implicitly rejected recently in *Miller vs. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762 (1995). In *Miller* this Court held squarely that the office of Section 5 is to prevent retrogression in black voting strength. The Court held that the United States' policy of using Section 5 to advance a "black-maximization policy" with regard to redistricting was contrary to the true office of Section 5 which is merely to prevent retrogression. The ruling in *Miller* casts considerable additional doubt on the legitimacy of the United States' effort here. Implementation of the NVRA as a separate method of registration is contemplated by the Act. Section 5, as construed in *Miller*, cannot be used to expand, or maximize, the reach of the NVRA.

Both the United States and the appellants assert that the Attorney General was somehow sandbagged regarding what was or was not being submitted for preclearance. This assertion borders on bad faith. The United States simply cannot make a good faith assertion that it did not understand that changes in State laws regarding State registration were dependent on passage of the proposed legislative package. The material submitted by the Assistant Secretary of State included a July 1994 Status Report which pointed out that the proposed "new legislation was to establish a unitary system 'to avoid a dual registration system.' " Accordingly, the appellants' contention that the Attorney General was never expressly put on notice that proposed changes in State registration procedures were dependent on passage of the proposed legislation is demonstrably incorrect. If the Attorney General truly needed a picture drawn, it was drawn by this

language and the inclusion of the proposed legislation itself.

The appellants also contend that the submission was inadequate and that any ambiguities should be resolved against the State. The appellants cite *Clark vs. Roemer,* 500 U.S. 646 (1991) for this general proposition. Nothing in *Clark,* however, supports the notion that ambiguities that arise because the Attorney General simply doesn't want to know, or doesn't want to bother to find out, the particulars of a submission should be resolved against the State. The reality is that the Attorney General liked what she saw in the amalgamated mass of materials proffered to her as a submission. The Attorney General recognized an opportunity to pursue her office's policy of maximizing the reach of Section 5. In her eagerness to preclear what she saw the Attorney General disregarded almost every regulation governing the content of Section 5 submissions. The Attorney General simply read inferences that suited her into the material sent her. 28 C.F.R. §51.27 lists certain requirements for the contents of proper submissions. None of these requirements was correctly followed. Some of the requirements such as subparts (c) and (h) respectively require specific statements regarding changes between the prior law and the newly enacted law, and statements regarding the jurisdictional basis and procedures for the change. 28 C.F.R. §51.37 provides that the Attorney General may request additional information regarding the actual effect of any submitted change. The Attorney General should simply have asked the submitting agent what the effect of the defeat of the legislative package would have been. If the Attorney General had

required a proper submission restricted only to completed changes as required by 28 C.F.R. §51.22 it could not today pretend that ambiguities exist.

CONCLUSION

The District Court was correct in its ruling that no change requiring preclearance has occurred. The judgment of the District Court should be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS YOUNG, ET AL., APPELLANTS

v.

KIRK FORDICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Mississippi is violating Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, by administering a registration system that reflects changes resulting from the manner in which it has chosen to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, when those changes have not been precleared.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-9a) is unreported.

JURISDICTION

The three-judge district court entered its final judgment on February 9, 1996. J.S. App. 10a-11a. Appellants filed their notice of appeal on April 8, 1996. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended appellants' time to file a jurisdictional statement until June 17, 1996, and appellants filed their jurisdictional statement on June 17. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

This case involves Mississippi's decision to implement the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, by applying that statute's procedures to registration for federal elections, but not to registration for state and local elections. The NVRA does not supplant the requirements of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* Under Section 5 of that Act, 42 U.S.C. 1973c (Section 5), voting changes in covered jurisdictions, including Mississippi, must be precleared by the Attorney General of the United States or by the United States District Court for the District of Columbia. The manner in which Mississippi proposed to implement the NVRA constituted a voting change that was subject to Section 5. As a result of the district court's decision in this case, however, Mississippi is now administering a registration system that has never been precleared. The question presented is whether Mississippi's administration of that system violates Section 5.

1. Mississippi has a long history of imposing discriminatory and burdensome registration requirements that have impeded minority citizens' exercise of the right to vote. See, *e.g.*, *United States* v. *Mississippi*, 380 U.S. 128, 131-133 (1965); *Jordan* v. *Winter*, 604 F. Supp. 807, 811-812 (N.D. Miss.) (three-judge court), summarily aff'd *sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984). Mississippi was one of the jurisdictions originally subject to the provisions of the Voting Rights Act that require every change in voting procedures to be precleared by the United States District Court for the District of Columbia or by

the United States Attorney General. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 329 (1966).

2. The National Voter Registration Act became effective in Mississippi on January 1, 1995. See 42 U.S.C. 1973gg note. The NVRA requires States to implement procedures designed to make registration less burdensome on voters and to remove opportunities for discrimination in the registration process. See generally 42 U.S.C. 1973gg (findings and purposes). The NVRA requires States to (1) treat every driver's license application as an application for voter registration, see 42 U.S.C. 1973gg-3; (2) accept applications for voter registration by mail, see 42 U.S.C. 1973gg-4; and (3) distribute voter registration applications with each application for services at various state agencies, including all public assistance and disability agencies as well as other agencies designated by the State, see 42 U.S.C. 1973gg-5. The NVRA also regulates the content of voter registration forms, see 42 U.S.C. 1973gg-3(c)(2)(B); 42 U.S.C. 1973gg-7(b)(1), and limits purges of voting rolls, see 42 U.S.C. 1973gg-6.[1]

The NVRA's requirements apply to elections for federal office. See, *e.g.*, 42 U.S.C. 1973gg-2(a) (Act requires States to "establish procedures to register to vote in elections for Federal office"). The statute allows each State to decide whether or not to apply the NVRA procedures to registration for state and local offices as well. See, *e.g.*, H.R. Rep. No. 9, 103d

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[1] The lower courts have upheld the NVRA against constitutional challenge. See, *e.g.*, *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); *Association of Community Orgs. for Reform Now (ACORN)* v. *Edgar*, 56 F.3d 791 (7th Cir. 1995).

Cong., 1st Sess. 21 (1993) ("While this Act applies only to Federal elections and States are free to apply other regulations to State elections, many States will prefer to have the same requirements for both Federal and State elections."). Except for Illinois and Mississippi, every State that has implemented the NVRA has allowed NVRA registrants to vote in all elections.[2]

3. In *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*), the district court found that Mississippi had violated Section 2 of the Voting Rights Act by maintaining a system that required voters to register for state elections in a separate procedure from the one in which they registered for local elections. Between 1987 (the date of the district court decision in *PUSH*) and the effective date of the NVRA, "Mississippi maintained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections—local, state, and federal." J.S. App. 7a. State law provided that every inhabitant who met certain age and residency qualifications, who had not been convicted of specified crimes, "and who shall have been duly registered as an elector by an officer of this state under the laws thereof * * * shall be a qualified elector in and for the county, municipality and voting precinct of his

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[2] Illinois's executive branch initially decided to implement the NVRA for federal elections only. That system was recently invalidated on state law grounds, and the State has been enjoined to enroll all NVRA registrants for state and local, as well as federal, elections. See *Orr* v. *Edgar*, No. 95-CO-0246 (Ill. Cir. Ct. May 1, 1996). The injunction has been stayed pending appeal to the Illinois Supreme Court.

residence, and shall be entitled to vote *at any election*." Miss. Code Ann. § 23-15-11 (1990) (emphasis added).

On the NVRA's effective date, Mississippi's existing registration procedures were inconsistent with the federal statute in several respects. See U.S. Mot. for Summ. J. Attach. D6. Accordingly, the State was required to make several changes in its practices in order to conform them to the federal statute. See generally *ibid.* Those changes were subject to preclearance under Section 5. On December 5, 1994, the Attorney General of the United States formally asked the State to submit for preclearance any changes prompted by implementation of the NVRA. Attach. C.

4. On December 20, 1994, the State submitted to the Attorney General for preclearance a package of NVRA-related voting changes. Attach. D1. In its letter of submission, the State sought preclearance for an implementation manual (dated November, 1994) prepared by the Secretary of State's office. *Ibid.* According to the State's letter, that manual constituted "Mississippi's plan to administratively implement NVRA." *Ibid.*[3] The State also transmitted an earlier implementation manual (dated July, 1994), a publication describing NVRA registration procedures at state agencies, a set of new voter registration forms, information on training provided to state and local election officials, and a copy of draft legislation to conform state law to the NVRA. Attachs. D7-D13. A sentence in a table in a July, 1994, compliance report included in the materials provided to the

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[3] Section 5 applies to administrative changes as well as legislative changes in election law. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 176-177 & n.22 (1985).

Attorney General stated that the proposed legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." Attach. D15. Mississippi's submission letter did not state or suggest in any way that the State intended to utilize the NVRA procedures for federal elections only. Nor did any of the accompanying materials so state. Instead, both the State's "plan to administratively implement NVRA" and the other submitted materials affirmatively indicated that all voters enrolled pursuant to the federal statute, like all voters enrolled under Mississippi's existing registration system, would be registered for both state and federal elections.[4]

From January 1, 1995, until February 10, 1995, some Mississippi election officials enrolled NVRA registrants for both state and federal elections. J.S.

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[4] For example, the manual stated that Mississippi's prior mail-in registration form "ha[d] been redesigned" to conform with NVRA requirements. U.S. Mot. for Summ. J. Attach. D6, at 2. The revised form, included in the submission, bore the title of "Mississippi Voter Registration Application." Attach. D8. It stated, "[i]f you are not registered to vote where you now live, you can use this form to register to vote or report that your name or address has changed." *Ibid.* Similarly, the submission included a new form to be used in voter registration at driver's license offices; that form stated, "[u]nder the new Motor-Voter Law, you may now make application to register to vote in Mississippi (or update your existing Mississippi voter registration) on the same form used for your Driver Services-related application." Attach. D11, at 2. The administrative manual also stated that the "NVRA requires election commissioners to follow specific procedures to purge voter registration lists" and that "[c]urrent methods" of purging "will change" in light of the statute's requirements. Attach. D6, at 4.

App. 3a-4a. Those officials did so in accordance with the instructions of Mississippi's Secretary of State, who had held training seminars for local election officials and state agency personnel in 1994. *Ibid.* At those seminars, the Secretary of State advised the officials "that citizens registering pursuant to the NVRA would be eligible for both federal and state elections." *Id.* at 3a.

On January 25, 1995, the proposed legislation designed to reconcile state law with the NVRA was tabled in the Mississippi legislature. J.S. App. 3a. The tabling of the proposed legislation created two types of uncertainty: (1) whether the State would continue to implement the NVRA on a unitary basis; and (2) if the State intended to continue its unitary system, how, as a matter of state law, it could do so. At the time the Attorney General precleared the State's submission of its administrative plan, Department of Justice officials were aware of, but had not insisted that the State resolve, those uncertainties.[5] Nor did the State withdraw its submission until the uncertainties were resolved or inform the Department that registration under the NVRA would be valid for federal elections only. The Attorney General precleared the State's submission on February 1, 1995. *Id.* at 15a-19a.

5. On February 10, 1995, Mississippi's Secretary of State and its Attorney General jointly issued a memorandum to election officials stating that

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[5] The procedures for the administration of Section 5, 28 C.F.R. Part 51, allow that Attorney General to "request from the submitting authority any omitted information considered necessary for the evaluation of the submission." 28 C.F.R. 51.37.

> [v]oters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

J.S. App. 22a. Voters who had registered under NVRA procedures prior to February 10, and who had been placed on the rolls for all elections, were removed from the list of individuals eligible to vote in state and local elections. *Id.* at 4a.

6. Six days after the February 10 memorandum, the Department of Justice formally requested that the State submit for preclearance its decision to treat NVRA registrants as eligible to vote in federal elections only. J.S. App. 24a-25a. The Department's letter observed that "while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1." *Ibid.* When Mississippi refused to make such a submission, the United States brought an action to enforce the preclearance requirement. On April 20, 1995, the United States filed a complaint in the United States District Court for the Southern District of Mississippi. The complaint alleged that the State had violated Section 5 by adopting a dual system of voter

registration without first obtaining preclearance. Compl. ¶¶ 16-43. The complaint also alleged that Mississippi was violating Section 7(a)(2)(B) of the NVRA, 42 U.S.C. 1973gg-5(a)(2)(B), by failing to afford voter registration at "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities." See Compl. ¶¶ 44-50.

On the same day, appellants brought the instant action, which alleged similar violations of Section 5 and the NVRA, and which sought similar relief. The two cases were consolidated (J.S. App. 5a), and a three-judge district court was convened to hear the Section 5 claim. See 42 U.S.C. 1973c. The parties filed cross-motions for summary judgment on that claim. The United States moved for a preliminary injunction, requesting that the State and its officials

> be preliminarily enjoined from implementing unprecleared changes to the voter registration and purge procedures set forth in the State of Mississippi's administrative plan for implementing the [NVRA], which received preclearance on February 1, 1995, and which provides that NVRA registrants are eligible to vote in all elections conducted in the State and that NVRA purge procedures govern eligibility to vote in all elections conducted in the State. The changes that are being implemented without the requisite Section 5 preclearance include the decision to limit NVRA registrants to voting in federal elections only, the decision to apply NVRA purging procedures to federal elections only, and the procedures adopted to implement these decisions.

U.S. Mot. for Prelim. Injun. at 1-2.

7. On July 24, 1995, the three-judge court issued an order granting the State's motion for summary judgment on the Section 5 claim and rejecting the plaintiffs' motions for summary judgment on that claim. J.S. App. 1a-9a. The court concluded that, under Mississippi law, only the legislature could decide to apply the NVRA's procedures to registration for state and local elections. *Id.* at 7a-8a. Because the State had never enacted proposed legislation to accomplish that end, the court believed that the Secretary of State's administrative authority to implement the NVRA extended to federal elections only. *Ibid.*[6] In the three-judge court's view, the State's submission was limited to those aspects of implementation that the Secretary of State could accomplish administratively—those involving the implementation of the NVRA for federal elections—and those aspects "ha[d] been precleared" on February 1. *Ibid.*

Although some election officials had implemented the NVRA on a unitary basis from January 1 to February 10, the three-judge court did not believe that the February 10 memorandum advising them to cease that practice constituted a voting change. It held that "the state may correct a misapplication of

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[6] Although the State's submission included a copy of the proposed legislation to apply the NVRA to state and local elections, the district court correctly held (see J.S. App. 7a-8a) that the unenacted law was not a part of the submission considered by the Attorney General. See 28 C.F.R. 51.22 (Attorney General will not consider on merits any proposed change "submitted prior to final enactment or administrative decision"). Mississippi's submission did not state that failure to enact that legislation would make NVRA registration valid for federal elections only.

its own laws, which by its conduct it has not ratified, without obtaining preclearance." J.S. App. 8a. The three-judge court found "no evidence of ratification," observing that "there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month long practice on the part of some election officials to qualify voters contrary to applicable state law." *Ibid.*

Finally, the court stated that "the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance." J.S. App. 8a. Because the obligation to apply NVRA procedures to federal elections is imposed by federal law, the court asserted,

> it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance * * *.

Id. at 8a-9a.

The three-judge court accordingly ruled for the State on the Section 5 claims. After a voluntary resolution of the NVRA claims, the court entered a final judgment pursuant to Fed. R. Civ. P. 58 on February 9, 1996. J.S. App. 10a-11a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On the date the NVRA became effective in Mississippi, the State maintained a unitary system of registration, in which a single registration made a voter eligible to vote in federal, state, and local elections. Since February of 1995, however, Mississippi has implemented a new dual registration system under which voters registered under the NVRA procedures will be permitted to vote only in federal elections, while those registered through the State's other registration procedures will be eligible to vote in all elections.

Mississippi's implementation of a new method of registration that authorizes voting only in federal elections creates the likelihood of voter confusion and may have a racially discriminatory impact. A similar dual registration system in Mississippi was struck down less than ten years ago as discriminatory in purpose and effect. Such a new procedure cannot be implemented until and unless it is precleared as required by Section 5 of the Voting Rights Act. The limited, federal-election-only nature of Mississippi's proposed NVRA registration, however, has never been precleared by either the Attorney General or the District Court for the District of Columbia. The district court was therefore required to enjoin its implementation until preclearance is obtained. *Clark* v. *Roemer*, 500 U.S. 646 (1991); *McCain* v. *Lybrand*, 465 U.S. 236 (1984). This Court should note probable jurisdiction in order to prevent the implementation of this important, unprecleared voting change.

1. Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act. See 28 C.F.R. Pt. 51, App. A covered jurisdiction may not enforce a

change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c; *Clark*, 500 U.S. at 652. If the jurisdiction seeks to enforce a change before preclearance is obtained, the United States or private plaintiffs "are entitled to an injunction prohibiting the State from implementing the changes." *Id.* at 653.

A suit to enjoin the implementation of an unprecleared voting change is heard by a three-judge district court and may be brought in the district in which the change is implemented. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 557-563 (1969). In such an action, the local district court does not consider whether the change is discriminatory in purpose or effect; that substantive question is reserved for the Attorney General or the District Court for the District of Columbia. The local district court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971).

2. For several years prior to the effective date of the NVRA, Mississippi permitted every registrant to vote in all elections. See Miss. Code Ann. § 23-15-11 (1990). Voter registration took place under procedures prescribed by Miss. Code Ann. §§ 23-15-31 to 23-15-45 (1990 & Supp. 1995). When the NVRA was enacted, mandating that additional procedures be made available for registering to vote in federal elections, the State was faced with a decision. It could

continue its existing practice of enrolling all registrants for state and local, as well as federal, elections by applying the new NVRA procedures to all elections, or it could limit NVRA registration to federal elections, thus requiring an NVRA registrant wishing to vote in state and local elections to register under the State's non-NVRA registration procedures.

The materials submitted to the Attorney General for preclearance by the State in December, 1994, gave no indication that voters enrolled pursuant to the NVRA would be registered for only federal elections. See pages 5-6 & note 4, *supra*. Indeed, the Secretary of State (the chief state election official) initially instructed subordinate officials to implement NVRA registration on a unitary basis—*i.e.*, as applicable to state and local, as well as federal, elections—and some of those officials followed that instruction. See pages 6-7, *supra*. A post-preclearance February 10 memorandum issued by the Mississippi Secretary of State and Attorney General stated that NVRA registration would not apply to state and local elections. But at the time of preclearance (February 1, 1995) neither the preclearance submission itself, nor the actions of state officials, suggested that Mississippi intended to restrict its implementation of the NVRA to federal elections only. To the contrary, both the submission and the officials' actions indicated that NVRA registration would apply to all elections.

The failure to enact proposed state legislation reconciling state registration procedures with the NVRA created uncertainty regarding the eligibility of NVRA registrants to vote in state elections. That legislation was tabled on January 25, 1995, approximately one month after the preclearance submission

was made, and seven days before preclearance was granted. See page 7, *supra*. Mississippi never informed the Attorney General that the failure to enact the proposed legislation would require it to change its existing practice of unitary registration and implement the NVRA for only federal elections. At the time of preclearance, both Department of Justice officials and State officials were nevertheless aware of the legislature's failure to act and of the uncertainties it created. The Attorney General did not resolve the uncertainties before issuing her preclearance decision. That failure, however, does not relieve the State of the burden to "identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 658. "Any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* at 656; *McCain*, 465 U.S. at 251; *DuPree* v. *Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), vacated and remanded for clarification, 115 S. Ct. 1684, clarified, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), aff'd, 64 U.S.L.W 3815, 3820 (U.S. June 10, 1996).[7]

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[7] As this Court has explained, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." *Clark*, 500 U.S. at 658. The Attorney General is required to make a variety of complex factual determinations during the 60-day preclearance period and is not able, as a practical matter, also to "monitor and identify each voting change in each jurisdiction subject to § 5." *Ibid.* Nor is the Attorney General expected to be an expert in state law. See *City of Lockhart*, 460 U.S. at 133 n.8 ("We also believe that the Attorney General and the District Court for the District of Columbia should be free to decide preclearance questions on the essentially factual issues of discriminatory purpose and effect. We doubt that Congress intended to force either into speculation as to the

To construe Mississippi's preclearance submission in this case as proposing a change to a dual registration system would be particularly unwarranted, since such a system raises special Voting Rights Act concerns. The State had adopted its unitary system only after a federal court invalidated an earlier dual system, in which persons were required to register separately for state and local elections. *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*). In holding that that dual system violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the *PUSH* court concluded that the practice had been adopted with a racially discriminatory purpose and that it continued to produce discriminatory results. See 674 F. Supp. at 1252-1261. The court explained that the dual system made registration more cumbersome generally, and that disparities between black and white Mississippians in income and education caused blacks to be disproportionately affected by the cumbersomeness. *Id.* at 1255-1256. The court observed that "[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal voter registration rolls, and this has

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state law."). If States were not required to advise the Attorney General specifically of each change worked by a submission, "it would add to the Attorney General's already redoubtable obligations," "diminish covered jurisdictions' responsibilities for self-monitoring," and create an incentive for States to make their submissions as broad and ambiguous as possible. *Clark*, 500 U.S. at 658-659; accord *McCain*, 465 U.S. at 257.

probably resulted in the defeat of black candidates." *Id.* at 1255.[8]

On February 1, 1995, when the Attorney General precleared the State's submission, the State had begun implementing the NVRA on a unitary basis. In addition, the submitted materials appeared to indicate that persons registered under the NVRA would be permitted to vote in all elections. The submission did not, in all events, make clear that NVRA registrants would be eligible to vote only in federal elections. The submission therefore did not "unambiguous[ly]" seek preclearance for a decision to implement the NVRA on a dual basis—a change from the basis for all other Mississippi voting registration at that time. See *Allen* v. *State Board of Elects.*, 393 U.S. 544, 571 (1969). Mississippi was free subsequently to decide to make NVRA registrants, unlike all other Mississippi voting registrants, eligible to vote in federal elections only. But implementation of that decision would

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[8] Black voters may thus be worse off under a dual registration system than they were before the enactment of the NVRA. Under the State's federal-election-only NVRA system, NVRA registrants must be placed on separate voter lists, which will likely increase voter confusion at the polls. That situation could lead to an increased rate of election day challenges, which may affect black voters most heavily. Cf. *PUSH*, 674 F. Supp. at 1255. In addition, voters who register under the NVRA procedures may decide not to register for state elections in the mistaken belief that NVRA registration is effective for all elections.

The discriminatory effect of those harms depends in part on how the State plans to inform NVRA registrants that they are eligible to vote in federal elections only. Those plans would be contained in the procedures the State submits for preclearance. Mississippi, however, has never submitted for preclearance procedures to implement a federal-election-only NVRA system.

constitute a change that could not be implemented without preclearance.

3. At the crux of the district court's reasoning was its conclusion that "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." J.S. App. 8a. Because Mississippi's initial decision to apply NVRA procedures to state elections was contrary to state law, the three-judge court held, Mississippi was free to change that decision—even after it had been precleared by the Attorney General—without obtaining a further preclearance for the change. That holding misapprehends applicable precedent. A State is required to obtain preclearance for a change from "the procedure *in fact* 'in force or effect,'" *Perkins*, 400 U.S. at 395, whether or not that procedure is consistent with applicable state statutes. See *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect."). Once Mississippi had *in fact* implemented its practice of permitting NVRA registrants to vote in state elections through the actions of its chief state election official (the Secretary of State) and subordinate officials, a subsequent change in that practice was required to be submitted for preclearance.

4. In refusing to enjoin the State's dual system, the three-judge court also asserted that "it is the federal government that has created this system of dual registration, not the State of Mississippi." J.S. App. 8a. In the court's view, that conclusion followed from the fact that "[t]he NVRA records are maintained at the instance of the federal government and

pursuant to federal law." *Ibid.* The court concluded that "[t]he State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a non-discretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General." *Id.* at 8a-9a.

That analysis is incorrect. "[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). The NVRA requires States to use certain procedures in registering voters for federal elections. But federal law permits a State to apply the Act's procedures in state and local elections as well. Mississippi's decision not to do so was a discretionary state policy choice, not the product of federal compulsion.[9] If Mississippi submits a federal-election-only NVRA plan for preclearance, the preclearance process must determine whether Mississippi has met its burden of showing that that plan, as implemented by the submitted forms and procedures, was not motivated by a discriminatory purpose, and will not have a discriminatory effect.

Mississippi was required to obtain preclearance before implementing the NVRA, for the NVRA, by its terms, does not "supersede, restrict, or limit the

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[9] Mississippi stands alone among jurisdictions covered by Section 5 in deciding to implement the NVRA for federal elections only.

application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1). See also 42 U.S.C. 1973gg-9(d)(2) ("[n]othing" in the NVRA "authorizes or requires conduct that is prohibited by" the Voting Rights Act). Congress in fact rejected a proposed amendment that would have exempted NVRA implementation from Section 5's preclearance requirement. See H.R. Rep. No. 9, 103d Cong., 1st Sess. 37 (1993) (minority report). Where a State decides to implement the NVRA by changing its practice of enrolling all registrants for all elections, that decision, and the procedures through which it will be implemented, have a "potential for discrimination" and must be submitted for preclearance. See *Hampton County Election Comm'n*, 470 U.S. at 181 (emphasis omitted).[10]

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[10] Section 5 of the Voting Rights Act does not compel all States to implement the NVRA in the same way. It does, however, require that a State's choices be proven to be nondiscriminatory before they are implemented.

CONCLUSION

The Court should note probable jurisdiction.

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No. 95-2031

IN THE
Supreme Court of the United States
October Term, 1995

THOMAS YOUNG, *ET AL.*,
Appellants,

v.

KIRK FORDICE, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF IN OPPOSITION
TO MOTION TO AFFIRM

Mississippi's chosen procedures for implementing the NVRA have created a dual system under which thousands of voters were registered in 1995 without being informed that they would be ineligible to vote in state and local elections once registered. This dual system, including the subsequent removal of thousands of registered voters from the voter rolls for state and local elections, *in a gubernatorial election year*, was implemented without Section 5 preclearance. To accept the argument that these changes, which directly affect access to the franchise, are exempt from the preclearance requirement, would judicially repeal Section 5's most important protections. The appellees (hereafter, the "State"), offer no tenable theory for upholding the decision below, and this Court should summarily reverse or note probable jurisdiction.

1. The State's primary argument is that the tabling of NVRA legislation by a committee of the Mississippi Legislature on January 25, 1995, implicitly redefined the State's then-pending Section 5 submission. Under this theory, the State's December 1994 Section 5 submission may have initially contemplated a unified NVRA registration system, but the nature of the submission changed as of January 25, 1995, the day the legislative committee tabled the pending NVRA legislation. Thus, the State concedes that "there are certain choices that States may make in implementing the [NVRA] which may require submission for preclearance for those States covered by Section 5," but contends that in light of the legislative committee's action the State decided to make only two such discretionary choices here -- the choice of "discretionary agencies which will be used in implementation" and of "purging procedures." Motion to Affirm at 9.

The clear problem with this argument is that the event which allegedly defined the State's "choices" with respect to NVRA implementation did not occur until January 25, 1995, long *after* the State made its actual Section 5 submission to the Attorney General. The State never made a Section 5 submission which defined its new NVRA choices in the narrow manner now urged by the State, nor did the State withdraw its earlier, much broader submission which clearly contemplated the implementation of NVRA procedures for all elections, federal, state and local. *See* J.S. at 5-6. Although the State communicated in writing with the Attorney General on January 26 and January 31, 1995, those communications say nothing about the effect of the legislative committee's action, nor about any desire on the part of the State to alter or redefine the Section 5 submission. U.S. Mot. for Prelim. Inj. & Summ. Judg. Ex. E.

The Attorney General's mere awareness of the legislative committee's action and of possible uncertainties created by that action does not convert the State's December 1994 Section 5 submission into a submission of the changes later made in the State's February 10, 1995, memorandum. This Court has definitively and repeatedly rejected the concept of submissions by implication. *McCain v. Lybrand*, 465 U.S. 236 (1984); *Clark v. Roemer*, 500 U.S. 646 (1991); *Dupree v. Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), *vacated and remanded for clarification*, 115 S. Ct. 1684 (1995), *clarified*, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), *aff'd*, 64 U.S.L.W. 3815, 3820 (U.S. June 10, 1996).

Furthermore, there is simply nothing in the State's November 1994 NVRA manual setting out procedures for implementing a dual registration system. The State's submission requested the United States Attorney General to

"please regard the publication dated November 1994 and entitled 'the National Voter Registration Act' as Mississippi's plan to administratively implement NVRA on January 1, 1995." Summ. Judg. Mot. Ex. 10. Accordingly, the State's citation to one phrase contained in a background document -- a "Status Report" (Summ Judg. Mot. Ex. 6) appearing at p. 101 of the Section 5 submission -- does not remotely serve to convert the preclearance of the procedures in the NVRA manual into preclearance of a dual system of registration.[1] The phrase, which states in full "Make NVRA provisions applicable to state and local election to avoid a dual registration system," is included at the end of a list of bullet points describing other information, and was not even part of the documents which the Secretary of State described as the State's NVRA

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[1] The State's argument on this point also makes the faulty assumption that the *concept* of a dual registration system could be precleared without the State submitting any of the *actual procedures* to be used in implementing such a dual system -- procedures the State did not announce until February 10, 1995. Clearly, the State was required to make numerous discretionary choices in establishing such a system beyond the two narrow choices the State has cited (voter registration agencies and purge procedures). The State had to determine, for example, how registrants will be advised of their limited eligibility status and the necessity of registering separately for state and local elections; the procedures for cancelling, for state and local elections, the eligibility of thousands of voters registered in early 1995, including how to notify these voters of such cancellation (*e.g.*, announcements in the media, targeted mailings, both, or neither); whether and how to provide an opportunity to re-register for state elections; what deadline, if any, would apply to re-registration of those whose registration was cancelled; and how election officials would deal with voters who showed up on election day under the mistaken impression that they had the right to vote. The State cannot argue that it has received preclearance for any of the choices it made on these crucial matters.

implementation plan. Such a buried nugget is clearly insufficient to discharge the state's burden "to identify with specificity each change that it wishes the Attorney General to consider," *Clark*, 500 U.S. at 656; *see also Allen v. State Bd. of Elec.*, 393 U.S. 544, 571 (1969). Even the district court did not attach any significance to this phrase.

2. The State argues that the Secretary of State's Section 5 submission to the United States Attorney General ("Attorney General") was unauthorized, unratified, and incomplete, and therefore should not have been acted upon by the Attorney General. But even if this argument were factually defensible -- and it emphatically is not -- acceptance of the argument would be fatal to the State's legal position. If the Secretary of State's Section 5 submission, and the Attorney General's subsequent preclearance decision, should indeed be treated as nullities because the Secretary of State lacked authority to make the submission, then there is no longer *any* argument that Mississippi has obtained preclearance for its procedures implementing the NVRA. Under this "unratified act" theory, then, appellants, plaintiffs below, would be entitled to judgment as a matter of law declaring that Mississippi has implemented unprecleared voting changes.[2]

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[2] The conclusion that no valid Section 5 submission was ever made requires a finding of a Section 5 violation unless voting changes made to implement the NVRA are exempt from the Section 5 preclearance argument. As appellants pointed out in their opening brief, this Court's precedents, including *Allen v. State Bd. of Elec.*, 393 at 565 n.29, clearly hold that voting changes made to comply with federal law must nevertheless be submitted for Section 5 preclearance. J.S. at 27-29. While the State cites *Beer v. United States*, 425 U.S. 130 (1976), as contrary authority, Motion to Affirm at 9, the citation is simply mistaken, because *Beer* says absolutely nothing about this issue. The State has not even attempted to distinguish *Allen* or to argue that it was

However, in arguing that the Secretary of State's action in submitting and implementing a unified voter registration system was unauthorized and unratified -- reflecting merely "the carelessness of a mid-level State functionary" -- the State seriously mischaracterizes the undisputed facts. Motion to Affirm at 8. First, the State's plan for implementing a unified NVRA registration system as of January 1, 1995, far from being a secret known only to an official in the Secretary of State's office, was developed by the Secretary of State's office in conjunction with the State's NVRA Implementation Committee, which included key members of the Mississippi House and Senate, a representative of the Mississippi Attorney General's office, legal counsel from the Governor's office, and representatives of many other state agencies, as well as the so-called "mid-level State functionary," Constance Slaughter-Harvey, who was actually the General Counsel to the Mississippi Secretary of State and the Assistant Attorney General for Elections. Summ. Judg. Mot. Ex. 8.

Further, after participating in the development of this implementation plan, which changed very little between the first version published in July 1994 (Summ. Judg. Mot. Ex. 5) and the final version published in November 1994 (Summ. Judg. Mot. Ex. 10), the Implementation Committee sponsored numerous sessions statewide to train public officials and members of the public in the use of the new procedures --

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wrongly decided; indeed, the State's Motion to Affirm, like the district court's decision, does not even cite *Allen*. But even if *Allen* were not dispositive here -- and it is -- the NVRA goes further, expressly providing that the requirements of the NVRA do not "supersede, restrict or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). Again, the Motion to Affirm nowhere acknowledges these clear provisions.

procedures clearly implementing a unified registration system. In addition to dozens of meetings with citizen groups, the State's "Calendar of Efforts to Comply" lists significant training sessions with key groups of public officials and indicates that the NVRA manual was distributed at these sessions. Summ. Judg. Mot. Ex. 3, at 2-6. The purpose of such training sessions, as one of the contemporaneous documents states, was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." *Id.* at 7 (describing meeting attended by 133 officials representing 68 counties, *id.* at 9).

In sum, key legislative officials, representatives of the Attorney General and Governor's offices, county election officials statewide and hundreds of members of the public were aware of the details of the plan to implement the NVRA effective January 1, 1995. *See also* J.S. at 4. There is no evidence that in 1994 anyone ever objected to the plan or offered the opinion that its implementation beginning on January 1, 1995, would be an "illegal" or "unauthorized" act.[3]

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[3] There is no dispute as to these facts showing that the Secretary of State's implementation plan was well-understood among responsible state and local officials. But if there were any such dispute, the district court was required to resolve it in favor of appellants, plaintiffs below, because the court was ruling on motions for summary judgment. *Celotex Corp. v. Carrett*, 477 U.S. 317, 323 (1986). It is highly significant, moreover, that the summary judgment papers submitted by the State contained no affidavit asserting that the Secretary of State's actions were unauthorized by or unknown to other state officials. The State has made this assertion solely in its briefs.

If, however, the State were correct that changes in state voting procedures are invalid until made by the Mississippi Legislature, it

Indeed, the very notoriety of Mississippi's intent to begin implementing this plan on January 1, 1995, as required by the NVRA, led the United States Attorney General quite properly to point out the need for Section 5 preclearance in late 1994, since the new procedures had not yet been submitted. There was simply nothing secret or unauthorized about the changes in voter registration procedures that began in Mississippi in early 1995.

Further, the State is completely unable to distinguish this Court's authorities which clearly hold that covered jurisdictions may not evade the preclearance requirement by declaring their own practices to be a nullity. The City of Canton's argument in *Perkins v. Matthews*, 400 U.S. 370 (1971), was no different from the State's argument here: it contended that the State Legislature had the authority to prescribe the election system to be used by the city, and that no voting change occurred when the city simply corrected its previous illegal practice of using an election scheme barred by state law. *Id.* at 394 ("Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections"). To borrow the State's term, the Mississippi Legislature was the relevant "body politic" in *Perkins* no less than in this case. Indeed, in *Perkins* there was no evidence at all that responsible agents of the State itself had ratified or authorized the acts of

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would follow that the procedures set forth in the State's February 10, 1995, memorandum are also invalid, because they were disseminated by an Assistant Attorney General and a Staff Attorney in the Secretary of State's office. There is no evidence of record that these procedures have been ratified by the Legislature or the Governor. The procedures, among other things, conflict with Mississippi law providing for a unitary voter registration system, Miss. Code Ann. § 23-15-11 (1990).

the City of Canton that were contrary to Mississippi law, yet the illegality of Canton's acts under state law were held irrelevant to the Section 5 inquiry. *A fortiori*, the same result follows here, where there *is* clear evidence that responsible State officials were fully aware of, and had participated in developing, the Secretary of State's implementation plan.[4]

3. Contrary to the State's argument, the Attorney General's February 1, 1995, preclearance of the submitted implementation plan reflects nothing improper, and the strained effort to invoke *Miller v. Johnson*, 115 S. Ct. 2475 (1995), is unavailing. The Attorney General was faced with the reality that the State was already conducting registration under the broad NVRA plan submitted in December 1994, and that such registration was being conducted prior to Section 5 preclearance. Withholding preclearance under these circumstances would have created its own difficulties, given

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[4] The State's effort to find case support for its position has yielded only *United States v. St. Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1971), a case where Section 5 preclearance was held inapplicable to the illegal acts of vote-buying committed by three local election officials in one election district of one parish, because such illegal acts could not be considered "changes" administered by the state. As the *St. Landry* decision holds, "[a] voting procedure need not have the seal of the state to come within § 5, but it must be more than these isolated instances of bargaining for votes." 601 F.2d at 865. As the decision also recognizes, Section 5 covers not only those changes which are enacted by a state legislature, but also those changes which a state "'shall seek to . . . administer.'" *Id.* at 864 (quoting Section 5). The massive statewide mobilization for NVRA implementation which took place in Mississippi with full knowledge of responsible state officials does not remotely fit the narrow exception recognized in *St. Landry*.

that the changes were already being implemented.[5] Even the State's own subsequent memorandum of February 10, 1995, acknowledged that further legislative action in 1995, though perhaps unlikely, was not foreclosed by the committee's action. The grant of preclearance for the State's actual submission was entirely reasonable, especially considering that the State remained free to develop and submit for preclearance a different set of procedures if it ultimately decided that was necessary in light of the committee's action. The State still could do exactly that at any time by making the required submission.

4. The State's complaints regarding "bootstrapping" Section 5 and the NVRA are similarly without merit. The NVRA expressly provides that its requirements do not supplant the guarantees of the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). As the United States has pointed out, although Section 5 does not require all states to implement the NVRA in the same manner, it does require that a State's choices be free of discrimination. U.S. Brief at 20 n.10. Whether or not the State's choices are or were free of

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[5] There certainly is no merit to the State's suggestion that a preclearance decision is invalid simply because the Attorney General could have requested more information prior to issuing a preclearance letter, or because the submission arguably did not encompass every item of information listed in the regulations. Motion to Affirm at 18. Indeed, imposing such requirements as a predicate to a valid preclearance decision would backfire dramatically on covered jurisdictions such as Mississippi, and bring the Section 5 preclearance process to a standstill, by forcing the Attorney General to reject any Section 5 submission that does not include every specific statement and piece of information listed in the regulations. There is no support for such a crabbed and counterproductive interpretation of the Section 5 regulations.

discrimination, however, is simply not at issue in this Section 5 enforcement action, which solely addresses the question of whether the State must *submit* for preclearance the new procedures it adopted in its February 10, 1995, memorandum, not the question of whether preclearance should be *granted*. *Perkins*, 400 U.S. at 383-85.

CONCLUSION

The decision below should be summarily reversed. In the alternative, the Court should note probable jurisdiction.

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RELEVANT DOCKET ENTRIES

AGN CLOSED
LEAD

U.S. District Court
Southern District of Mississippi (Jackson)

CIVIL DOCKET FOR CASE #: 95-CV-197

Young, et al v. Fordice, et al Filed: 04/20/95
Assigned to: Judge Tom S. Lee
Judge E. Grady Jolly
Judge William H. Barbour, Jr.

Demand: $0,000 Nature of Suit: 441
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

THOMAS YOUNG, on behalf of themselves and all others smilarly [sic] situated plaintiff	A. Spencer Gilbert, III [COR LD NTC] WISE, CARTER, CHILD & CARAWAY P. O. Box 651 Jackson, MS 39205-0651 (601) 968-5500
RICHARD L. GARDNER, on behalf of themselves and all others similarly situated plaintiff	A. Spencer Gilbert, III (See above) [COR LD NTC]
ELEANOR FAYE SMITH, on behalf of themselves and all others similarly situated plaintiff	A. Spencer Gilbert, III (See above) [COR LD NTC]

RIMS BARBER, on behalf of themselves and all others similarly situated plaintiff	A. Spencer Gilbert, III (See above) [COR LD NTC]
UNITED STATES OF AMERICA consolidated plaintiff	Carlton W. Reeves [COR LD NTC] U. S. ATTORNEY'S OFFICE 188 E. Capitol St., Suite 500 Jackson, MS 39201 (601) 965-4480 Elizabeth Johnson [COR] T. Christian Herren, Jr. [COR NTC] U. S. DEPT. OF JUSTICE Civil Rights Division P. O. Box 66128 Washington, DC 20035-6128
v.	
KIRK FORDICE, in his capacity as Governor of the State of Mississippi defendant	Robert E. Sanders [COR LD NTC] OFFICE OF THE ATTORNEY GENERAL P.O. Box 220 Jackson, MS 39205-0220 359-3680
MIKE MOORE, in his capacity as Attorney General of the State of Mississippi defendant	Robert E. Sanders (See above) [COR LD NTC]

DICK MOLPUS, in his capacity as Secretary of State of the State of Mississippi defendant	Robert E. Sanders (See above) [COR LD NTC]
GREGG PHILLIPS, in his capacity as the Executive Director of the Mississippi Department of Human Services defendant	Robert E. Sanders (See above) [COR LD NTC]
STATE OF MISSISSIPPI consolidated defendant	Robert E. Sanders (See above) [COR LD NTC]

4/20/95	1	COMPLAINT Filing Fee $ 120.00 Receipt #7433; Notice of Assignment mailed. (sec) [Entry date 04/21/95]
4/20/95	2	Pre-Discovery Disclosure by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff Rims Barber (sec) [Entry date 04/21/95]
5/11/95	4	ANSWER to Complaint by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips (Attorney Robert E. Sanders) (spc) [Entry date 05/12/95]

5/12/95	5	MOTION by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips to Consolidate Cases 3:95cv198BN with this case (sec) [Entry date 05/15/95]
5/30/95	6	ORDER granting [5-1] motion to Consolidate Cases 3:95cv198BN with 3:95cv197LN (signed by Judge Tom S. Lee); copies mailed. (sec)
5/30/95	–	Consolidated Lead Case 3:95cv197LN. (sec)
6/5/95	8	MOTION by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips, consolidated defendant State Of Mississippi to Amend [4-1] answer by defendants (sec)
6/5/95	9	MOTION by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips, consolidated defendant State Of Mississippi for Partial Summary Judgment (sec)
6/16/95	10	Pre-Discovery Disclosure by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips, consolidated defendant State Of Mississippi (cwl)

6/19/95	–	Case assigned to panel of Judge Tom S. Lee and Judge E. Jolly and Judge William H. Barbour Jr. (sec) [Entry date 06/20/95]
6/19/95	12	ORDER CONSTITUTING THREE-JUDGE COURT; that Requesting Judge Tome [sic] S. Lee; Circuit Judge E. Grady Jolly and District Judge William H. Barbour, Jr. designated as members of the three judge district court [w]hich is to hear and resolve this matter, as set out (signed by Judge Henry A. Politz); copies mailed. (certified copies to each designated judge) (sec) [Entry date 06/20/95]
6/20/95	13	ITEMIZATION of FACTS by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips, consolidated defendant State Of Mississippi in support of [9-1] motion for Partial Summary Judgment by consolidated defe, defenant (sec) [Entry date 06/21/95]
6/26/95	16	MOTION by consolidated plaintiff United States for Partial Summary Judgment (sec) [Entry date 06/28/95]

6/26/95	17	ITEMIZATION of FACTS by consolidated plaintiff United States in support of [16-1] motion for Partial Summary Judgment by consolidated plai (sec) [Entry date 06/28/95]
6/26/95	18	Response by consolidated plaintiff United States to Defendants' itemization of Facts. (sec) [Entry date 06/28/95]
6/26/95	19	MOTION by consolidated plaintiff United States for Preliminary Injunction (sec) [Entry date 06/28/95]
6/26/95	20	Attachment by United States to [19-1] motion for Preliminary Injunction by consolidated plai, [16-1] motion for Partial Summary Judgment by consolidated plai (1-vol). (sec) [Entry date 06/28/95]
6/26/95	21	Response by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff Rims Barber to Itemization of Facts. (sec) [Entry date 06/28/95]
6/26/95	22	CROSS MOTION by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff Rims Barber for Summary Judgment on section 5 issue, with exhibits 1-20 attached. (sec) [Entry date 06/28/95]

6/27/95	23	CROSS MOTION (Corrected) by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff rims for Summary Judgment (sec) [Entry date 06/30/95]
7/10/95	24	Response by all defendants to itemization of facts in support of plaintiffs' motion for summary judgment (lwe) [Entry date 07/12/95]
7/10/95	25	RESPONSE by all defendants in support of [16-1] motion for Partial Summary Judgment by consolidated plaintiff United States (lwe) [Entry date 07/12/95]
7/20/95	26	Minute entry: hearing on defendant's motion for partial summary judgement; plaintiff's motion for partial summary judgment and corss [sic]-motion of defendants for partial summary judgement before Judges Jolly, Barbour and Lee with Cherie G. Bond as Court Reporter on 7/19/95, Jackson, MS. Action Taken: Reserved ruling. (sec)

7/20/95	27	Minute entry: hearing on Motion for Preliminary Injunction before Judges Jolly, Barbour and Lee with Cherie G. Bond as Court Reporter on 7/19/95, Jackson, MS. Action Taken: Government to respond by close of business on 7/21/95 and attorney Herrin do not have authority to withdraw motion (sec)
7/20/95	28	Exhibit list and EXHIBITS: G-1, G-2 and D-1 to Motion for Preliminary Injunction by defendant Kirk Fordice, defendant Mike Moore, defendant Dick Molpus, defendant Gregg Phillips, consolidated defendant State Of Mississippi, consolidated plaintiff United States (1-envelope). (sec)
7/24/95	29	MOTION by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff Rims Barber for Summary Judgment and regarding 7/19/95 oral argument referring to: [23-1] cross motion for Summary Judgment by plaintiffs, [22-1] cross motion for Summary Judgment on section 5 issue by plaintiffs (sec)

7/24/95	30	ORDER denying [29-1] supplemental amended motion for Summary Judgment, denying [23-1] cross motion for Summary Judgment, denying [22-1] cross motion for Summary Judgment on section 5 issue, dismissing as moot [19-1] motion for Preliminary Injunction, denying [16-1] motion for Partial Summary Judgment, granting [9-1] motion for Partial Summary Judgment, Dismissing count-II of Young plaintiffs complaint and count-1 of USA complaint (signed by Judge Tom S. Lee, Judge Barbour and Judge Jolly); copies mailed. (sec) [Entry date 07/25/95]
8/7/95	31	MOTION by consolidated plaintiff United States to Alter Judgment, or to Amend [30-1] order Dismissing count-II of Young plaintiffs complaint and count-1 of USA complaint (sec) [Entry date 08/10/95]
8/15/95	34	RESPONSE by all defendants to [31-1] motion to Alter Judgment by consolidated plai (sec)

9/7/95	35	ORDER denying [31-1] motion to Alter Judgment, denying [31-2] motion to Amend [30-1] order Dismissing count-II of Young plaintiffs complaint and count-1 of USA complaint (signed by Judgment Tom S. Lee); copies mailed. (sec)
12/15/95	36	STIPULATION of dismissal by parties that all claims raised in these consolidated actions have been resolved, and the entry of final judgment is appropriate (copy to Judge Lee) (sec) [Entry date 12/18/95]
12/15/95	–	Case closed (sec) [Entry date 01/31/96]
2/7/96	37	Unoposed [sic] MOTION by consolidated plaintiff United States for Entry of Final Judgment (sec) [Entry date 02/08/96]
2/9/96	38	FINAL JUDGMENT; judgment entered against U.S. and Young plaintiffs, as set out and granting [37-1] motion for Entry of Final Judgment (signed by Judges Tom S. Lee; William H. Barbour, Jr and E. Grady Jolly); copies mailed; ob 1996, PAGE 371. (copy to each Judge). (sec) [Entry date 02/12/96] [Edit date 02/12/96]

4/8/96	39	NOTICE OF APPEAL to Supreme Court by plaintiff Thomas Young, plaintiff Richard L. Gardner, plaintiff Eleanor Faye Smith, plaintiff Rims Barber (mailed to attorneys of record). (sec) [Entry date 04/09/96]
4/9/96	40	NOTICE OF APPEAL to Supreme Court by consolidated plaintiff United States (sec) [Entry date 04/10/96]
6/11/96	41	MOTION by consolidated plaintiff United States to Dismiss Appeal (sec) [Entry date 06/12/96]
6/12/96	42	ORDER: that the United States has moved this three-judge Court for entry of an order dismissing the United States' 4/9/96, Notice of Appeal to the U.S. Supreme Court; accordingly, it is hereby ordered that [40-1] Supreme Court appeal noticed by the United States is Dismissed (signed by Judges E. Grady Jolly, William H. Barbour Jr. and Tom S. Lee); copies mailed. (sec) [Entry date 06/13/96]
6/24/96	–	Supreme Court's Notice of Filing an Appeal. (sec) [Entry date 06/25/96]

(Section 5 Submission
No. 94-4505)

STATE OF MISSISSIPPI
SECRETARY OF STATE
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JACKSON, MISSISSIPPI 39205-0136
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DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE, ELECTIONS
AND GENERAL COUNSEL

December 1, 1994
(Filed Dec. 6, 1994)

Honorable Sara Donovan
Attorney, Voting Section
Civil Rights Division
Department of Justice
320 First Street NW, Room 816
Washington DC 20534

Dear Sara:

I enjoyed our conversation of Monday and appreciate your concern with implementation of NVRA in the state of Mississippi.

Since we are awaiting legislative action in January, 1995, we intended to wait until passage of the proposed legislation before sending the "pre-clearance" packet to you. It now seems that we need to give you some information relative to the implementation of the NVRA program in January, 1995.

I am therefore enclosing a packet of background information relative to NVRA implementation in Mississippi. This includes detailed information on the administrative program, including forms and procedures to be used by the agencies for the implementation of the program. I am also enclosing information relative to training, outreach and community education efforts.

If you need additional information or have questions once you have reviewed this information, please call me at (601) 359-6359 or Kate Margolis at (601) 359-4187.

Sincerely yours,

/s/ Connie
Constance Slaughter-Harvey

CSH:lsr

Enclosures

[Federal Express Mailing Label Omitted]

Introduction

Mississippi's National Voter Registration Act (NVRA) Implementation Committee, created by the governor's Executive Order No. 739 in December 1993, is charged with ensuring full compliance with the Act. The order designated the Secretary of State as the chief state election official.

During the past year, intense efforts have been made to prepare for full implementation of the NVRA beginning January 1, 1995. Representatives from the affected state agencies met regularly during 1994 to plan the necessary administrative procedures, and each agency has received training on these procedures. Training for election officials has been conducted statewide. Community outreach programs have been conducted to secure the involvement of community activists as well as educate the general public.

The information in this packet explains Mississippi's efforts to comply with the NVRA and outlines plans for statewide implementation.

Part One contains information presented to Mississippi's 82 voter registrars and 410 election commissioners. This information includes manuals which describe in detail the NVRA programs and procedures, and the roles and responsibilities of election officials.

Part Two contains information presented to state agency personnel explaining their roles and responsibilities in conducting motor-voter and agency-based registration.

Part Three outlines community education, outreach and training efforts around the state.

Part Four contains Mississippi's draft legislation and a summary of hearings held by the Senate Elections Committee.

Calendar of Efforts to Comply

This calendar includes NVRA committee meetings, training for election officials, training for agency personnel, and community education effort. Training and community education will be ongoing.

December 1993

15 Governor issues Executive Order No. 739 creating a National Voter Registration Act Implementation Committee

January 1994

Committee members are appointed

February

24 Implementation Committee meeting – Jackson

March

21 Working Group meeting – Jackson

April

14 Working Group meeting – Jackson

17 Jackson State University Class Officers – Jackson

27 Working Group meeting – Jackson

May

4 Department of Public Safety meeting – Jackson

8 Gee Grove M.B. Church – Mendenhall

10 Agency representatives meeting – Jackson

[3]

20 Statewide Community Activists community organizing training – Tougaloo College

24 Implementation Committee meeting – Jackson

25 Mendenhall Ministries – Mendenhall

June

10 Elections Task Force meeting – Jackson

11 Voter Awareness Conference workshops – Jackson

13 NAACP Legal Redress Committee – Jackson

21 Agency representatives meeting – Jackson

26 Mississippi Black Caucus of Local Elected Officials (MBCLEO) – Biloxi

29 Department of Public Safety meeting – Jackson

30 Outreach Committee of Congressman Bennie Thompson – Jackson

July

14 Circuit Clerks Association Convention workshop – Tupelo

19 Election Commissioners Association of Mississippi (ECAM) training – Starkville

19 Southern Echo student representatives – Jackson

20 Mississippi Baptist Convention – Greenwood

20 ECAM – Itta Bena

21 ECAM – Oxford

[4]

21 Working Group meeting – Jackson

24 New Beginning M.B. Church – D'lo

28 ECAM – Wesson

28 Black Supervisors Association – Biloxi

29 ECAM – Gulfport

August

11 Voice of Calvary Ministries – Jackson

12 Mississippi Delta Community College – Moorhead

15 Mississippi Valley State University orientation – Itta Bena

16 Coahoma Community College – Clarksdale

16 Northwest Community College orientation – Senatobia

17 Pearl River Community College orientation – Poplarville

17 University of Mississippi orientation – Oxford

18 Gulf Coast Community College – Perkinston

18 Jackson State University Junior Class Officers – Jackson

18/19 Holmes Community College orientation – Goodman

19 Alcorn State University orientation – Lorman

22 Copiah-Lincoln Community College orientation – Wesson

22 Elections Task Force meeting – Jackson

23 Jones County Junior College – Ellisville

[5]

26 Election Center Conference – New Orleans

27 Annual Black Family Reunion – Tupelo

30 Millsaps College Activities Fair – Jackson

30 Mississippi State University – Starkville

31 Southwest Mississippi Community College – Summit

31 Northeast Mississippi Community College – Booneville

September

1 Working Group meeting – Jackson

11 Marion County Concerned Citizens – Columbia

12 Meridian Community College Government classes – Meridian

17/18 Delta Blues Festival – Greenville

19 Elections Task Force meeting – Jackson

21 Itawamba Community College – Fulton

25 Covington County NAACP banquet – Collins

October

7 Working Group meeting – Jackson

8 National Council of Negro Women – Mound Bayou

11 Elections Task Force meeting – Jackson

13 Division of Medicaid Supervisors training – Lake Tiak O'Khata

[6]

23 National Federation of Colored Women's Clubs – Vicksburg

23 A. Phillip Randolph Institute (Labor) Convention – Grenada

25 WIC Independent Clinics In-Service meeting – Jackson

25 Department of Human Services Supervisors training – Jackson

November

3 Department of Rehabilitation Services Regional Supervisors training – Jackson

6 Rankin County Action League (Little Zion UM Church)

11 Mississippi Action for Progress (Head Start) – Jackson

12 NAACP Convention – Jackson

14 State Department of Health Social Workers training – Jackson

16 State Department of Health Clerical Workers training – Jackson

16 Senate Elections Committee NVRA hearings – State Capitol

17 NVRA Training Session for Circuit Clerks and Election Commission Chairpersons – Jackson

December

12 Choctaw Health Center personnel training – Philadelphia

13 Elections Task Force meeting

15 First shipment of combined declination/voter registration forms to agencies

January 1995 – Implementation

[7] PART ONE – ELECTION OFFICIALS

Training for election officials has been conducted statewide. The most recent training session for voter registrars and election commissioners was conducted November 17 to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995.

Manuals presented to election officials and the revised Mississippi mail-in registration form are included in this section.

Formal training dates for Mississippi's election officials:

June

11 Voter Awareness Conference workshop – Jackson

July

14 Circuit Clerks Association Convention workshop – Tupelo

19 Election Commissioners Association of Mississippi (ECAM) – Starkville

20 ECAM – Itta Bena

21 ECAM – Oxford

28 ECAM – Wesson

29 ECAM – Gulfport

August

26 Election Center Conference – New Orleans

November

17 NVRA Training Session for Circuit Clerks and Election Commission Chairpersons – Jackson

[8] STATE OF MISSISSIPPI
SECRETARY OF STATE
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DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE, ELECTIONS
AND GENERAL COUNSEL

Training Seminar
on
NATIONAL VOTER REGISTRATION ACT
ETV Auditorium
Thursday, November 17, 1994
10:00 a.m. – 1:00 p.m.

AGENDA

Welcome	Constance Slaughter-Harvey Assistant Secretary of State
NVRA Registration Programs	Kate Margolis, NVRA Coordinator Secretary of State's Office
Motor-Voter Registration	Major Ron Ford Dept. of Public Safety
Purging	Reese Partridge, Staff Attorney Secretary of State's Office
Fail-Safe Procedures	Kate Margolis
Mailing Requirements	Sonya Hayes Postal Business Center, Jackson
Adjournment	1:00 p.m.

[9] Attendance at NVRA Training Session
November 17, 1994.

*68 Counties represented with 133 Officials in Attendance.

[Mississippi Map Omitted]

Attendance at NVRA Training Seminar Nov. 17, 1994.

*68 Counties represented with 133 Officials Attending.

OFFICE OF THE MISSISSIPPI SECRETARY OF STATE

The National Voter Registration Act

(SEAL)

An information manual
November 1994

For additional information.
please contact:
Mississippi Secretary of State's Office, 601-359-6357

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OFFICE OF THE MISSISSIPPI SECRETARY OF STATE

The National Voter Registration Act

Overview

The National Voter Registration Act (NVRA) is designed to achieve two main purposes:

- to give eligible citizens more opportunities to register to vote
- to maintain the integrity of the voter rolls by requiring specific procedures for purging

Section One – *Motor-voter and agency-based registration*

What is NVRA?

The NVRA is commonly known as "motor-voter" because it targets driver's license offices, where an estimated 90 percent of people 18 and older will be reached. In order to make voter registration equally convenient for those who do not have a driver's license, the law targets public agencies that serve the poor and disabled. Also, armed forces recruitment offices are designated as voter registration agencies.

What does NVRA require?

The NVRA requires driver's license offices and designated agencies to conduct voter registration as part of their routine business.

> ***Driver's license offices*** will offer people the opportunity to register to vote at the same time they apply for or renew their driver's license or notify the office of a change of address.
>
> ***Public assistance agencies*** are required to offer people the opportunity to register to vote at the same time they apply for agency assistance, renewal or recertification for assistance or notify the agency of a change of address.

What is NVRA's role in voter registration?

The role of motor-voter and agency-based registration is to help people apply for voter registration and forward completed applications to the circuit clerks. It's up to the

applicant whether or not to apply. Voter registration is not automatic.

> **Important:** The decision to register or not is confidential. If the person chooses to register, the office through which they applied is confidential. The source of registration cannot be publicly disclosed.

If the person is already registered and doesn't need to update his or her registration name or address, there will be no additional steps in the process. If the person chooses to register, he or she will fill out the voter registration form. Office staff are required to provide the same amount of assistance filling out the voter registration form as they would the agency's own forms.

[2] Registration forms

Motor-voter forms

Driver's license offices will use ***two different voter registration forms.***

> One is combined with the application for a Mississippi driver's license. On the application circuit clerks receive, non-registration information will be blacked out.

> Another voter registration form is combined with the driver's license renewal notice mailed to the person's home. It will look similar to the new mail-in registration form.

Agency-based form

Agency offices will use a form that combines the voter registration application with a form that agencies are required to keep for their records. The application that circuit clerks receive from agencies will be identical to the new mail-in forms.

Federal mail-in form

The armed forces recruitment offices will use the new federal mail-in form.

Mail-in form

The 1992 mail-in registration form has been redesigned. The top portion will have general instructions about registering to vote in Mississippi. The applicant will detach this portion. The application itself will be a fold-over mailer with the address of each county circuit clerk on the back.

Note: An attesting witness is no longer required.

Deadlines

Once these offices accept a completed voter registration application, they must send it to the proper circuit clerk within five days.

Applications accepted ***on the deadline day for registration*** must be transmitted within five days. The Secretary of State's Office will notify agencies of upcoming deadlines.

Note: Circuit clerks must accept and process motor-voter and agency-based applications 25 days before the election. If valid, the date of registration is the date the application was received by the agency.

Circuit clerks will be receiving applications from these agency offices:

- Department of Human Services
- Department of Health
- WIC Independent Clinics
- Medicaid
- Department of Rehabilitation Services
- Armed forces recruitment offices

Note: Mail-in applications still must be post-marked 30 days prior to the election.

[3] **Procedures**

Standard procedures will direct motor-voter and agency registration programs. Agencies will send applications to the circuit clerks on a weekly basis, primarily through the mail. An agency transmittal sheet will be sent with the applications.

Methods may differ slightly from agency to agency:

Agencies with offices in each county, such as the Department of Human Services and the Department of Health, will send applications directly to the circuit clerk in that county.

Agencies with regional or field offices, such as Medicaid and the Department of Rehabilitation Services,

will sort applications for forwarding to the proper circuit clerk.

In some cases, circuit clerks may have to re-route applications received from an agency to a circuit clerk in another county.

The armed forces recruitment offices will send completed applications to the Secretary of State's Office for routing to the proper circuit clerk.

> **Important:** An open line of communication between these offices and circuit clerks offices should be established. Circuit clerks will have a list of the locations of agency offices in the county. Each agency should provide the proper circuit clerk the name of a contact person for each site.

Agency training and supplies

A manual has been prepared for agency staff. It covers information on who is eligible to register, how to complete the application, and how and when to forward the applications to the county circuit clerk. Staff training in this area is being added to the training programs already in place for agency personnel.

Agency registration sites will get voter registration applications through normal agency supply channels.

Reporting

The Secretary of State must submit a report to the Federal Election Commission (FEC) on March 31 of every odd-numbered year. The numbers will be used to assess the

impact of the NVRA on election administration. The FEC will report to Congress.

The 1995 report will include only the number of registered voters in the state as of the 1994 general election and a narrative description of NVRA implementation in the state. However, records must be kept starting January 1995 for making the 1997 report.

The circuit clerk must report the following to the Secretary of State's Office:

- The total number of registered voters in the federal election prior to the most recent federal general election.
- The total number of registered voters in the most recent federal general election.
- The total number of new valid registrations in the county between the past two federal general elections (does not include address updates, total duplicates or rejected applications).
- The total number of applications received from sources other than motor-voter and agency-based registration, including applications received in the circuit clerk's office, by mail-in registration, registration drives, libraries or schools.
- The total number of duplicate applications between the past two federal general elections. Du[4]plicates must be reported by each of the following must be reported by each of the following categories:

    1. driver's license offices
    2. public assistance agencies
    3. agencies serving the disabled

4. armed forces recruitment offices
5. other designated sites such as libraries and schools
6. mail-in registration
7. all other means such as in-person, registration drives, etc.

• The number for the public assistance agencies will be the combined total duplicates received from:

Department of Human Services
Department of Health
WIC Independent Clinics
Medicaid

The number for the agencies primarily serving the disabled will be the total received from the Department of Rehabilitation Services.

Section Two – *Purging*

The NVRA requires election commissioners to follow specific procedures to purge voter registration lists.

Current methods that will remain the same

Names may be removed at any time:

• upon the registrant's death
• upon criminal conviction as applicable to state law
• upon a court ruling of mental incompetence
• upon the request of the registrant
• upon receiving notice that the registrant has registered in another state or county

Current methods that will change

- the optional "4 year purge" is prohibited
- a registrant's name cannot be removed solely for not voting
- a registrant who moves within their county of registration may not be purged
- the method for purging voters who have moved away will change

Purge for moving out of the county

Previously, the election commission gathered factual information, considered the information, and voted whether or not to purge. For example, an election commissioner read in the newspaper that Bob Smith sold his house and took a new job in Alabama. The election commission considered this information and voted to purge his name.

Now, the election commission must start with the same factual information and attempt to get Bob Smith's written confirmation that he has moved out of the county. A **confirmation mailing** must be sent to Bob Smith's last known address to try to get his written okay to remove his name from the list.

[5] Confirmation mailing

The confirmation mailing is a forwardable two-piece mailing that includes a pre-addressed postage paid postcard for the registrant to verify or correct the information and return to the election commission.

Routine Procedure

1. The election commissioners receive factual information that gives them reason to believe a registrant has moved out of the county. For example, a jury summons is returned with "forwarding order expired."

2. The registrant's name is placed on the new inactive list.

3. The registrant is sent a confirmation mailing to the last known address.

4. Once the commission receives the confirmation return postcard, the registrant will be purged or updated to active status.

5. If the confirmation postcard is not returned, AND the registrant fails to vote within two subsequent federal general elections, the registrant's name is purged.

> **Important:** Records of all actions taken by the election commission to maintain the accuracy of the voter registration list must be documented. These records must be kept for a minimum of 24 months and be open to public inspection.

An "Ongoing Program"

Under the NVRA, election commissions are REQUIRED to conduct an "ongoing general program" that makes a reasonable effort to remove the names of voters who have moved out of the county. The "ongoing program" must be non-discriminatory and comply with the Voting Rights Act of 1965.

> Election commissions may choose one of two methods to accomplish this:

- the National Change of Address (NCOA) program or
- a mass mailing of postcards

Both use a comparison of the voter list with postal records.

National Change of Address (NCOA) Procedure

1. Election commissions must choose an NCOA vendor licensed by the U.S. Post Office.

2. Commissions provide the NCOA vendor with the list of registered voters in the county.

3. The NCOA vendor compares the voter list with the list of people who have filed change-of-address notices with the Post Office and provide the commission with a list of "matches." The vendor will identify registrants who have moved within the county and outside the county. The NCOA also identifies temporary moves.

4. If the information shows that a registrant has moved **within the county**, update the address in the voter registration file and send the registrant a notice that his or her voting address has been changed.

[6] 5. If the information shows that a registrant has moved **out of the county**, place the registrant's name on the inactive list, then send a confirmation mailing to the registrant's new address.

6. If the confirmation return postcard is not returned, AND the registrant fails to vote within two subsequent federal general elections, the registrant's name is purged.

For more information about the NCOA program, call:

U.S. Postal Service's National Consumer Support Center
1-800-238-3150

Mass mailing of postcards procedure

1. Send non-forwardable postcards to all registrants in the county.

> **Suggestion:** A mass mailing could be used to send each voter polling place information or other helpful information.

2. Registrants whose cards are returned as undeliverable are placed on the inactive list, then sent a confirmation mailing.

3. If the confirmation return postcard is not returned AND the registrant fails to vote within two subsequent federal general elections, the registrant's name is purged.

Timing

Every county will have an "ongoing program" which must be conducted at least once a year. However, the "ongoing program" must be completed 90 days before an election. If information indicating that the registrant has moved out of the county is received AFTER the 90-day deadline, the registrant cannot be placed on the inactive list and sent a confirmation mailing until after the general election.

Questions & Answers about purging

Q. What about military personnel?

A. If the registrant does not return the confirmation return postcard and does not vote absentee, the registrant can be purged according to the NVRA procedures. However, election commissions may take note of special circumstances.

Q. What about federally registered voters?

A. Federally registered voters must be purged the old way, not NVRA. To find out how to purge or if you have any federally-registered voters in your county, call 404-331-3468 or write to Donna Pressley, Regional Voting Rights Coordinator, Atlanta Region USOPM, Room 905, 75 Spring St. S.W., Atlanta GA 30303.

Q: What about people who don't file a change of address with the Post Office?

A: Send the confirmation mailing to the registrant's last known address.

Q: What elections count as a federal general election?

A: Congressional general elections.

Q: What if a county's 4-year purge has been precleared by the Justice Department?

A: Complete the purge before January 1995.

[7] Q: Can counties still have a re-registration?

A: Yes, but it must be precleared by the Justice Department.

Q: What is the cost of using the NCOA program?

A: The cost of the service usually depends on the size of the county. Costs also vary from vendor to vendor. The minimum charge is typically $250-$500. It's a good idea to "shop around" to get the best price. Counties might consider forming or joining a bulk-buying cooperative.

Here's how NCOA vendors typically price their services:

- one time set-up fees ($50-$100)
- per file fees ($2-$10 per 1,000 records)
- per "match" fees (3-5 cents per match)
- file conversion charges

Q: Are counties eligible for postal discounts?

A: Yes. It is important to contact the Postal Service far in advance in order to qualify for the discounts.

Examples of what to do with mail returned from the Post Office

Situation: Mailed item returned with notation "Moved, left no address," "Unable to deliver," "Addressee Unknown," "No such address," etc.
Procedure: Move registrant to inactive and send confirmation mailing.

Situation: Mailed item returned with new address in different county or out of state.
Procedure: Move registrant to inactive and send confirmation mailing.

Situation: Mailed item returned with new address that is a post office box.
Procedure: Move registrant to inactive and send confirmation mailing.

Situation: Mailed item sent to residence address returned with new address that looks like residence address in the same county (not a post office box).
Procedure: Leave registrant in active status, update registrant's residence address and send him or her notice of the change.

Situation: Mailed item returned indicating registrant is temporarily away.
Procedure: Do nothing.

Situation: Mailed item returned with new address obviously at a college.
Procedure: Do nothing.

Situation: Mailed item returned with new address out of the U.S.
Procedure: If APO or FPO, do nothing. Otherwise, move registrant to inactive and send confirmation mailing.

Situation: Mailed item returned indicating registrant is deceased.
Procedure: Cancel registration.

Situation: Mailed item returned with new address that is a business.
Procedure: Move voter to inactive and send confirmation mailing.

[8] **Situation:** Mailed item returned for no reason, address is illegible, or address does not match registrant's name.
Procedure: Do nothing to the registrant's registration. Remail item.

Election Day Procedures

The NVRA requires "fail safe" election day procedures to protect a registrant's right to vote as long as he or she

continues to live in the county where he or she is registered.

Q. Who is qualified to be a "fail safe" voter?
A. Registrants who move within the same county but fail to notify the circuit clerk of the changed address will still be allowed to vote. This is current practice when a registrant has moved from one precinct to another in the same supervisor's district.

Registrants who have not moved, but the voter registration records incorrectly show that they have, will still be allowed to vote. This is current practice in Mississippi.

All registrants on the inactive list, who continued to live in the county, will be allowed to vote.

Q: How will they vote?
A: By affidavit ballot.

Q: Where will they vote?
A: Registrants should vote in the precinct appropriate for their current address. Pollworkers may need to direct "fail safe" voters to their new precincts.

Reporting

The Secretary of State must submit a report to the Federal Election Commission (FEC) on March 31 of each odd-numbered year. The numbers will be used to assess the impact of the NVRA on election administration. The FEC will report to Congress.

The 1995 report will include only the number of registered voters as of the 1994 general election and a narrative description of NVRA implementation in the

state. However, records must be kept starting in January 1995 for making the 1997 report.

The election commission must report the following to the Secretary of State's Office:

- The total number of inactive voters on file as of the date of certification of the most recent federal general election (does not include registrants who were inactive but restored to active status).

- The total number of registrations that were canceled (purged) from the registration file between the past two federal general elections.

- The number of confirmation mailings sent between the past two federal general elections and the number of responses received during that same period.

If you have questions about implementation of NVRA, please contact:

The Secretary of State's Election Division
601-359-6357

Motor - Voter Application (hand written notation)

SECTION 1. **CHECK THE PROPER BOX FOR YOUR APPLICATION AND FILL OUT COMPLETELY** MV 11-94

☐ Operator's License ☐ Learner's Permit ☐ CDL ☐ Class D Comm. Lic. ☐ ID Card ☐ Address change ☐ Name change

PRINT IN BLACK INK

Full Name of Applicant (Last Name) (First Name) (Middle/Maiden) (Circle if Appropriate) Jr. Sr. II III IV

Home Address (Use 911 Address) **Social Security Number**

City State Zip County

SECTION 2 **MAILING ADDRESS (If Different from Home Address)**

Date of Birth: Mo. Day Year | Age | Race

Mailing Address

City State Zip

[redacted]

SECTION 4. **VOTER DECLARATION – Read and sign**

I swear/affirm that: I am a U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X _____ _____ _____ _____

Signature (or mark) of applicant Date Daytime Phone number(s) where applicant can be reached.

X _____

If applicant is unable to sign, the signature of the person who helped fill out this application is required.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

If you were previously registered to vote under a different name or address, please give that address.

Last Name First Name Middle/Maiden

City/Town County State Zip Code

Motor - Voter Application (hand written notation)

DRIVER LICENSE RENEWAL NOTICE / VOTER REGISTRATION APPLICATION

This is a two-part form. The top portion is an application that may be used to register to vote. The bottom portion is your Driver License Renewal Notice.

Under the new Motor-Voter Law, you may apply to register to vote in Mississippi while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form and bring it with you to the driver license office. Your registration form will be forwarded to your local circuit clerk who will notify you of your voter status. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes. If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes.

If you wish only to renew your license, bring this entire form (uncompleted) with you and present it at the driver license office.

This voter registration form may also be used to change your address and/or you name on your existing voter registration file. Be sure to indicate if this application is for a new registration address change, or name change by checking the appropriate box(s) below.

SECTION 1. | | **NEW REGISTRATION** | | **ADDRESS CHANGE** | | **NAME CHANGE**

Mr. Mrs. Miss Ms. (Last Name) (First Name) (Middle/Maiden) (Circle If Appropriate) Jr. Sr. II III IV

Home Address (Use 911 Address) **Social Security Number**

City County State Zip

Mailing Address (If Different from home address) Date of Birth Mo. Day Year Race

City State Zip

If you were previously registered to vote under a different name or address, please list that name or address.

Last Name First Name Middle/Maiden

City/Town County State Zip

SECTION 2. **VOTER DECLARATION Read and Sign**

I swear/affirm that: I am an U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X_____ _____
Signature (or mark) of applicant Date

X_____ _____
If applicant is unable to sign, the signature of the person who helped fill out this application is required. Date

_____
Daytime Phone number(s) where applicant can be reached.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

This area reserved for Driver License Renewal Notice Data Card

Draft – Registration Application Used by Agencies (handwritten notation)

SECTION 1. **Mississippi Voter Registration Application** MV 11-94

"If you are not registered to vote where you now live, would you like to apply tor register to vote here today?"

☐ **Yes** ☐ **No** **Signature**_____ **Date**_____

If you do not check a box, you will be considered to have decided not to register to vote at this time.

Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency. If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private. If you believe someone has interfered with your right to register or decline to register to vote or your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with the Secretary of State at 401 Mississippi St., Jackson, MS 39201 or by calling 1-800-xxx-xxxx.

If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes.

SECTION 2. **COMPLETE THIS SECTION**

Mr. Mrs. Miss Ms. (Last Name) (First Name) (Middle/Maiden) (Circle If Appropriate) Jr. Sr. II III IV ____

Home Address (Use 911 Address) **Social Security Number**

City County State Zip

Mailing Address (If Different from home address) Date of Birth Mo. Day Year Race (optional)

City State Zip

SECTION 3. IF YOU WERE PREVIOUSLY REGISTERED UNDER A DIFFERENT NAME OR ADDRESS, LIST THAT NAME OR ADDRESS

Last Name First Name Middle/Maiden

Street

City/Town County State Zip

SECTION 4. **VOTER DECLARATION Read and Sign**

I swear/affirm that: I am an U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X_____ _____
Signature (or mark) of applicant Date

X_____ _____
If applicant is unable to sign, the signature of the person who helped fill out this application is required. Date

_____
Daytime Phone number(s) where applicant can be reached.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

For Office Use Only

MV 11/94

Agency Declination/Registration Form (handwritten notation)

(Federal)
handwritten notation

Mail-In Voter Registration Application

You can use this form to:
- **register to vote**
- **report that your name or address has changed**
- **register with a party**

Please use black ink and print clearly

This space for official use only

1 Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle One) Jr Sr II III
2	Address (see instructions) — Street (or route and box number)	Apt., or Lot #	City/Town	State / Zip Code
3	Address Where You Get Your Mail If Different From Above		City/Town	State / Zip Code
4	Date of Birth ___/___/___ Month Day Year	**5** Telephone Number (optional)	**6**	Identification Number (see item 6 under your state)
7	Party Affiliation (See item 7 under your State)		**8**	Race/Ethnicity (see item 8 under your State)

9 I swear/affirm that:
- I am a United States citizen
- I meet the voter eligibility requirements of my state and subscribe to any oath required

(See item 9 under your state before you sign.)
- The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be subject to a fine or imprisonment or both under Federal or State laws.

Please sign full name (or put mark) ↓

Date: ___/___/___ Month Day Year

10 If you are unable to sign your name, who helped you fill out this application? Give name, address, and phone number (phone number is optional).

Detach here

Fold here

Please fill out the sections below if they apply to you.

If this application is for a change of name, what was your name before you changed it?

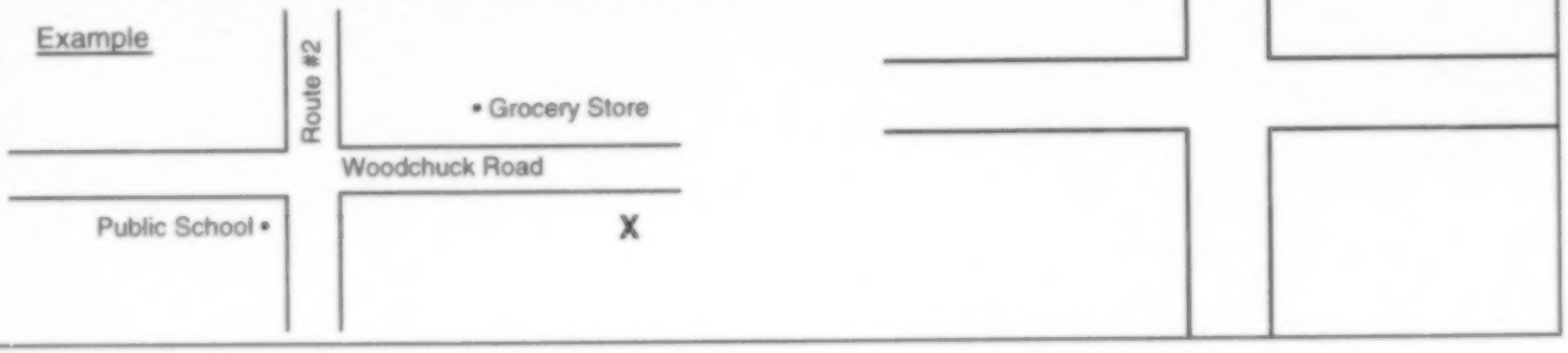
A Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle One) Jr Sr II III

If this application is for a change of address, what was your last address?

B	Street (or route and box number)	Apt., or Lot #	City/Town	State	Zip Code

If you live in a rural area, or if you have no address, please show on the map where you live.

C
- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.



To Mail: 1. Address the back of this application (see address under your state) 2. Remove plastic strip below. 3. Fold form at middle and seal at top. 4. Put on a first-class stamp and mail.

Specifications for Confirmation Mailing

Size: 4" x 6" This size qualifies the mailing for 19 cents postage.

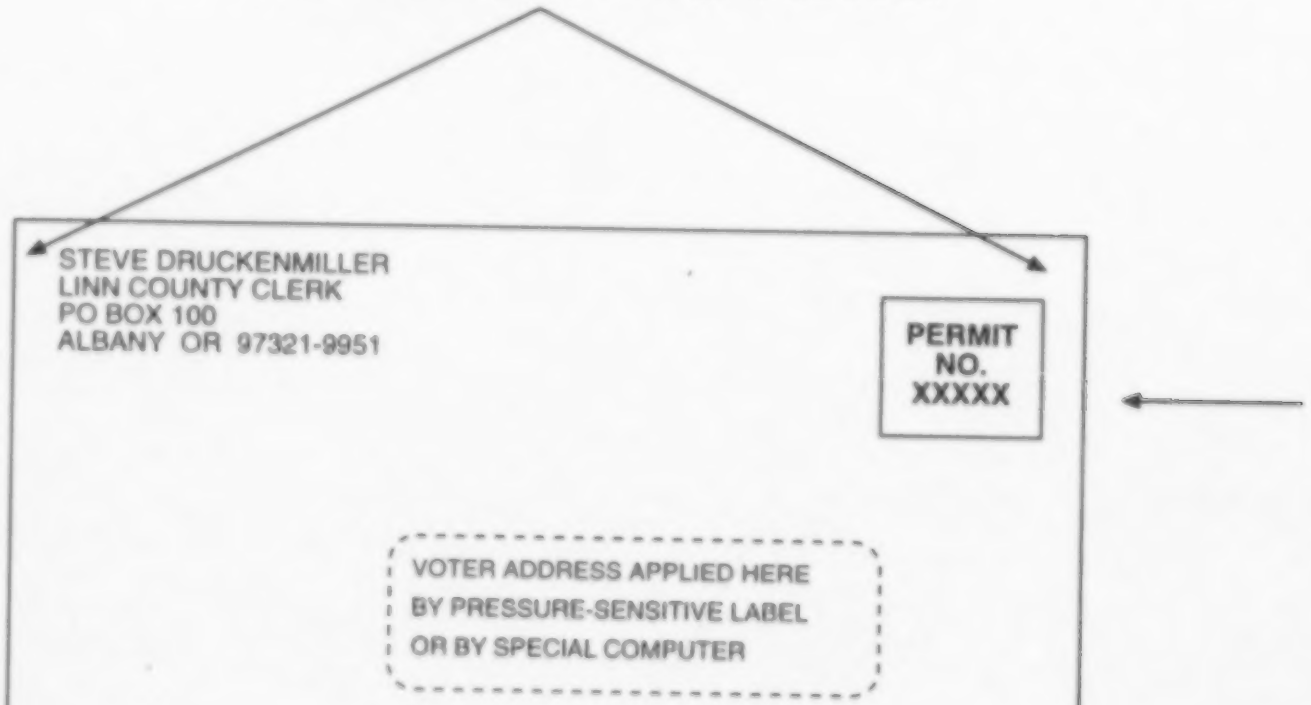
Thickness of paper stock (before folded): The Postal Service recommends 9000dths thickness. The minimum allowed is 7000dths thickness.

Camera-ready artwork: Your local post office will provide you with camera-ready artwork for the "Business Reply" portion of the mailing. This will ensure that it meets postal requirements.

For more information, contact: Postal Business Center— 401 E. South Street, Jackson, MS 39201-9825; Phone: 800-551-8230; Fax: 601-360-2707

OUTSIDE OF MAILER WHEN FOLDED

Glue Spots (ON REVERSE SIDE),
if you elect for Paper Power to glue, fold & seal.



PERFORATION

DETACH HERE
NOT A VOTER REGISTRATION CARD

Name (print or type) Last, First, Middle			Date of Birth
Address Where You Live	City	State	Zip
Mailing Address (if different from above)	City	State	Zip
Phone (Optional)	Name and address of Last Voter Registration		
Social Security # (Optional)	Signature		Date

Confirmation Mailing
(handwritten notation)

INSIDE OF MAILER WHEN FOLDED

Glue Spots (ON REVERSE SIDE),
if you elect for Paper Power to glue, fold & seal.

Dear Voter:

The Scott County Election Commission is updating voter information.

If you live in Scott County:
* Fill-out and return the attached card to vote in future elections.

If you have moved outside Scott County:
* Fill-out and return the attached card to remove your name from the registration books.
* Contact your new local election office to register to vote.

If you do not return this card within 30 days:
* You may have to vote by affidavit ballot in upcoming elections.
* Your registration will be canceled if you do not vote before two federal general elections.

If you have questions:
* Call the Scott County Election Commission at 469-3456.

PERFORATION

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL
FIRST-CLASS MAIL PERMIT NO 668 ALBANY OR

POSTAGE WILL BE PAID BY ADDRESSEE

STEVE DRUCKENMILLER
LINN COUNTY CLERK
PO BOX 100
ALBANY OR 97321-9951

POSTNET BARCODE

SECTION 1. **Mississippi Voter Registration Application** MV 11-94

IMPORTANT!

- If you are not registered to vote where you now live, you can use this form to register to vote or report that your name or address has changed.
- If you have questions, call your county Circuit Clerk or call the Secretary of State at 1-800-829-6786.

To register to vote, you must:

- be a U.S. citizen
- live in the state and county for at least 30 days before voting
- be 18 years old by the next general election
- have not been convicted of a crime that bars you from voting or have had your rights restored as required by law
- have not been declared mentally incompetent by a court

IMPORTANT!

- Complete Sections 2, 3, and 4, then mail or hand deliver it to your county Circuit Clerk at least 30 days before the election in which you want to vote.
  County addresses are on the back.
- If you are qualified and the information on your form is complete, you will be mailed a voter card that tells you where to vote.

SECTION 2. **"PLEASE PRINT OR TYPE IN BLUE OR BLACK INK"**

Mr. Mrs. Miss Ms. (Last Name) (First Name) (Middle/Maiden) (Circle If Appropriate) Jr. Sr. II III IV ____

Home Address (Use 911 Address) **Social Security Number**

City County State Zip

Mailing Address (If Different from home address) Date of Birth Mo. Day Year Race (optional)

City State Zip

SECTION 3. IF YOU WERE PREVIOUSLY REGISTERED UNDER A DIFFERENT NAME OR ADDRESS, LIST THAT NAME OR ADDRESS

Last Name First Name Middle/Maiden

Street

City/Town County State Zip

SECTION 4. **VOTER DECLARATION Read and Sign**

I swear/affirm that: I am an U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X _____ _____
Signature (or mark) of applicant Date

X _____
If applicant is unable to sign, the signature of the person who helped fill out this application is required.

_____
Daytime Phone number(s) where applicant can be reached.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

For Office Use Only

List of County Clerks' Addresses

and

Envelope Front omitted

MV 11/94

Revised Mail-in Registration Application (handwritten notation)

OFFICE OF THE MISSISSIPPI SECRETARY OF STATE

The National Voter Registration Act of 1993

What is the NVRA?

The intent of the National Voter Registration Act is:

1. To increase the number of citizens registered to vote and

2. To establish safeguards that ensure a citizen's right to vote.

The Act is designed to increase the number of Americans registered to vote by requiring many public agencies to provide registration opportunities to their clients simultaneous with other services.

Who can use NVRA?

The Act requires that the opportunity to register be provided with *each application* for assistance, renewal/recertification of assistance, or notification of change of address in agencies that provide public assistance or serve persons with disabilities.

Agency staff must provide *the same amount of assistance* to a person completing a voter registration form as they would provide to fill out an agency's own forms.

- If the agency routinely provides services at the person's home, the agency also must provide voter registration services at the person's home.
- If a person registers at an agency, the origin of his or her registration is confidential.

The opportunity to register must be provided to the person who applies for assistance, but not to others on

whose behalf the person might be applying. If the person is applying only on behalf of others, the opportunity to register need not be offered. If you are uncertain whether to offer the opportunity to register to vote, the opportunity should be offered.

Agencies & Election Officials

In Mississippi, voter registration takes place on the county level. It is the job of the county circuit clerk to determine eligibility and register voters. The agencies' role is only to help people apply for voter registration and to forward the application to the county circuit clerk. As agency offices take on their new roles in the voter registration application process, communication between these offices and the county circuit clerks' offices will be vital.

Agency Registration Procedures

Agency Voter Registration Application

The agency voter registration application includes:

- ***declination form*** and
- ***voter registration application.***

Declination Form
(Section 1)

The *declination form* is required by federal law. It documents the interaction between an agency and the person completing the form. *It must be retained by the agency for 24 months.*

Completing the Form

The person should answer the question, "If you are not registered to vote where you live now, would you like

to register here today?" by checking either the "yes" box or the "no" box. The person should sign and date in the space below the check boxes.

If the person checks "yes" on the declination form, he or she should fill out the voter registration application. The person may do so in private or may request help from the provider. It is important that the person have the same opportunity to com[2]plete the declination form and voter registration application as is given to complete agency forms.

If a person checks "no" or does not fill out the declination, assume the person chooses not to register.

The person may choose to take the application with him or her and mail it to the county circuit clerk. In this case, the "no" box would be checked on the declination form. Remember the agency is prohibited from requiring an applicant to personally mail the form.

The NVRA requires that all the information on the declination form be shared with applicants.

Voter Registration Application (Sections 2, 3, 4)

Applicants must fill out each blank on the voter registration application. The provider should review the application to ensure that it is complete and legible.

Providers unsure if an application is complete should forward the application per normal procedure to the county circuit clerk's office.

Completing the Voter Registration Application

A person who chooses to fill out the voter registration application may do so in private or may request help from the provider.

The person must be provided the *same degree of assistance* as is provided to complete agency forms, unless the person refuses such assistance.

The following instructions will help providers answer questions about filling out the application.

Voter Registration
Application Instructions

Section 2

Name. Print last name, first name and middle/ maiden name.

Home Address. This must be the *physical street address* where the person lives. It cannot be a post office box, rural route, or business address.

If the person does not have a traditional address (for example, homeless) then the person must describe in detail the residence location.

Mailing Address. Must be provided only if different from home address.

The circuit clerk needs a mailing address to inform the person of the polling place and precinct where he or she should vote. Also, the circuit clerk may need to verify information by mail.

Social Security Number.

Date of Birth.

Race. This is optional. Choices could include White, Black, Asian, Native American, Hispanic, or Other.

Section 3

This section should be filled out if the person was registered to vote under a different name or address. This

information is used to keep registration lists updated and accurate.

Section 4

The Voter Declaration is a declaration under oath that the person has read and met the requirements for registering to vote.

The applicant must sign and date the application.

If the applicant is unable to sign, he or she should place an "X" or make a mark in the signature box, and the person who helped the applicant fill out the form should sign the application.

The applicant should provide the phone number(s) where he or she can be reached in case the circuit clerk has questions about the application. This could be a work number, home number, friend's house, etc.

What To Do With Complete Voter Registration Forms

1. Separate the declination form from the voter registration application.

2. Keep the declination form in your files for 24 months.

3. Count the number of completed applications received by the agency. Record the count per agency procedures for reporting to the Secretary of State's Office.

4. Send completed voter registration applications to the county circuit clerk's office per agency procedure. The agency should forward the applications within five (5) days of receipt. Include a transmittal sheet with the applications.

[3] *Influencing Persons*

Agency employees shall not:

- influence or attempt to influence persons to choose or not to choose a particular political party or preference, or to register to vote in any particular manner.
- display any political preference or party allegiance.
- make any statement to an applicant or take any action the purpose or effect of which is to discourage the person from registering to vote.
- make any statement to an applicant or take any action the purpose or effect of which is to lead the person to believe that a decision to register or not to register has any bearing on the availability of services or benefits.
- disclose any applicant's voter registration information except as needed for the administration of voter registration.

Voter Registration Supplies

Additional blank registration forms may be obtained through usual agency channels.

Contact Information

Each agency must notify the Secretary of State's Office in writing of the name of an agency coordinator and the location of each agency registration site. In addition, each agency should provide to the appropriate county circuit clerk the name of a contact person for each site.

Registering To Vote

The information contained in this section is included for those providers who want to be able to answer general questions about voter registration.

Who may register?

Any person who is:

1. A United States citizen

2. A resident of Mississippi. Must have lived in the state and county (and municipality, if applicable) 30 days before the election in which they want to vote.

3. At least 18 years old by the next general election date. A 17-year-old may register to vote and vote in the primary as long as he or she will be 18 by the general election date.

4. Not convicted of murder, rape, bribery, theft, arson, obtaining money or goods under falsepretense [sic], perjury, forgery, embezzlement, or bigamy, or has had his or her rights restored as required by law.

5. Not declared mentally incompetent by a court.

Deadline To Register

The voter registration deadline is 30 days before the election in which you want to vote. Applications received by the agency on the deadline day must be forwarded to the circuit clerk within five (5) days.

The Secretary of State's Office will notify agencies of registration deadlines as necessary. Once registered in a county, voters may update their registrations (change address, name, etc.) at any time.

How often should I register?

Anytime [sic] information on your voter application has changed since you last registered. This includes home address, mailing address or name. If you are unsure if you are already registered, fill out a new application.

Will I know if my registration was accepted?

The county circuit clerk will mail a voter registration card to let you know that the registration was accepted. If notification is not received within 30 days after the voter registration application was turned in, you should call the county circuit clerk's office, usually located in your county courthouse.

How do I know where to vote?

Your voter registration card will list the location where you vote. Also, you may contact the county circuit clerk's office to find out where to vote.

Will someone be at the polling place to help me?

Yes. Pollworkers will demonstrate how to mark ballots. If a voter is blind, disabled, or can't read or write, he or she also can take someone with them to help.

[4] **What if I can't get into my polling place?**

The pollworkers can bring a ballot to you at the curb outside the polling place. Call your county circuit clerk's office to get more information.

What if I can't get to the polling place on election day?

Certain voters, including those who are physically disabled or are age 65 or older, may apply for and cast an absentee ballot by mail. Registrants who are permanently physically disabled may apply to have their names placed on the permanent absentee list. The county circuit clerk will then mail a ballot for every election.

New laws also allow you to vote absentee if you will be working during polling hours (7 a.m. to 7 p.m.) or if you will be away from your home county on election day.

Check with your circuit clerk several weeks ahead of the election to see if you are eligible to vote absentee.

This Manual

The document has been prepared by the Elections Division of the Secretary of State's Office to assist in the implementation of voter registration in state agencies. It is not meant to supersede federal or state laws or rules, nor does it have the force of law. To obtain copies of the National Voter Registration Act or other information about the contents of this reference manual, or to suggest modifications, you may contact:

Secretary of State
Elections Division
P.O. Box 136
Jackson, MS 39205
Phone (601) 359-6357
Fax (601) 354-6243

For answers to any questions that arise about voter registration, contact your county circuit clerk's office. A list with their phone numbers and addresses will be printed on all voter registration forms.

[LOGO] MISSISSIPPI DIVISION OF MEDICAID

Transmittal Sheet
for
Agency Voter Registration Forms
from
Address of Regional Office

TO: Circuit Clerk of _____ County

FROM: _____, Supervisor

_____ Regional Office

DATE: October 14, 1994

SUBJECT: Voter Registration Forms

Attached are _____ voter registration forms for the week beginning, _____, and ending _____.

Attachments

BUCKLE-UP! IT'S THE LAW!
SAFETY BELTS SAVE LIVES

WELCOME TO
YOUR DEPARTMENT OF PUBLIC SAFETY
DRIVER SERVICES BUREAU

Please fill out this application if you wish to:

- ☑ **Obtain an Operator's License (Class R)**
- ☑ **Obtain a Learner's Permit (17 or Over)**
- ☑ **Obtain a Commercial Driver License (CDL)**
- ☑ **Obtain a Class "D" Comm. License (non-CDL)**
- ☑ **Obtain an Identification Card (ID Card)**
- ☑ **Change your Address**
- ☑ **Change your Name**
- ☑ **Register to Vote ***
  (Section 5 of Application must be completed)

* Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency. If you would like help in filling out your voter registration application form, we will help you. The decision whether to seek or accept help is your choice. You may fill out the application form in private.

If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes.

——— CAREFULLY READ INSTRUCTIONS ON REVERSE SIDE ———

The section numbers on this page explain the matching section numbers on the application below.
The information requested in Sections 1 - 4 must be printed, using black ink.

SECTION 1 — INDICATE TYPE OF APPLICATION AND PROVIDE INFORMATION

With this application, you may apply for one of the following- an Operators License, a Learner's Permit (17 or over), a Commercial Driver License (CDL), a Class "D" Commercial License (Non-CDL) or a Non-Drivers Identification Card You may also use this section to change your name and/or address on your driver license and/or voter registration files

* If you are applying for a driver license, you must hold a valid learners permit and pass a skills test; OR you must present a valid out-of-state driver's license, have a Social Security card, and pass the vision, signs, and rules of the road examinations
* If you are applying for a learner's permit, you must be at least 17 years old (If you are less than 17 years old, ask the examiner for assistance). You must present a certified birth certificate and Social Security card. If you are under 18 years of ape you must also present proof that you are enrolled in school or have completed high school.
* If you are applying for a non-driver's identification card, you must be at least 13 years old. You also must present a certified birth certificate, Social Security Card and have your signature notarized.
* If you are changing your name and/or address on your driver license there is a $5.00 fee for this service. You must also provide official documents reflecting your new name (example: court order, marriage license, birth certificate) A Social Security card alone is not sufficient proof
* If you are currently registered to vote in Mississippi, you may also change your name and/or your address on your voter registration by filling out this application and completing Section 5 on bottom of the form. This is a free service.
* If you are applying for a commercial class "D" license, you must pass a written and vision examination and be at least 17 years of age. If you do not posses a valid license, you will be required to pass a skills test
* If you are applying for a CDL, see the instructions below.

SECTION 2 — MAILING ADDRESS AND PERSONAL INFORMATION

* Complete the mailing address portion ONLY IF you receive your mail at a location that is different from your home address.
* FILL IN ALL BLOCKS PERTAINING TO YOUR AGE AND PHYSICAL DESCRIPTION.

SECTION 3 — DRIVER LICENSE, HEALTH QUESTIONS, AND DECLARATION.

* You must answer all questions in this section. If you answer "YES" to any question, please explain briefly in the space provided.
* Signature of Applicant. Proof read your application. read the declaration and sign using your normal signature. Include the date on your application.

SECTION 4 — REGISTERING TO VOTE

* If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes. If you would like to make application to register to vote, indicate by marking the "YES" block and go immediately to Section 5 and complete. If you choose not to register to vote, indicate by marking the "NO" block and submit your application to the driver's license agent. If you do not check a box, you will be considered to have decided not to register to vote at this time.

DO NOT WRITE OR MARK IN THE AREA BETWEEN SECTION 4 AND SECTION 5. THIS AREA IS FOR DEPARTMENTAL USE ONLY

SECTION 5 — VOTER REGISTRATION APPLICATION

* Under the Motor-Voter Law, you may now make application to register to vote in Mississippi (or update your existing Mississippi Voter Registration) on the same form used for your Driver Services-related application. If you complete Section 5, your registration form will be forwarded to your circuit clerk's office for processing. You will then receive your voter status by mail from your circuit clerk's office.

FOR COMMERCIAL DRIVER LICENSE (CDL) APPLICANTS ONLY

Under the Commercial Motor Vehicle Safety Act of 1986, persons who operate commercial vehicles are required to obtain a Class A, B. or C designation on their driver's license. Please read the following and circle the class of license and endorsements for which you are applying:

Class A— Any combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.

Class B— Any single vehicle with a GVWR of 26,001 or more pounds, and any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.

Class C— Any single vehicle less than 26,001 pounds GVWR or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. This group applies to vehicles which are placarded for hazardous materials or designed to transport 16 or more persons, including the operator.

L — Commercial instruction permit

ENDORSEMENTS

- E - Motorcycle
- H - Hazardous Materials
- N - Tank Vehicles
- P - Passenger Vehicles
- T - Double/Triple Trailers
- X - Tank Veh W/Hazardous End.

If you have circled A, B. C, or L, you are considered a commercial driver. Please provide the following Information:

Name _____

Social Security No._____

Tag number & type of commercial vehicle owned:

_____ _____
State and tag number Type of commercial vehicle

_____ _____
State and tag number Type of commercial vehicle

FOR DEPARTMENTAL USE ONLY
RESTRICTIONS

1. Corrective lenses
2. Restricted for use between the hours 6:00 A.M. and 10:00 P.M.
3. Outside rearview mirror
5. Automatic transmission
8. Motorcycle only
9. Company owned vehicle
A. Daylight driving
B. Custom equipment
C. 45 M.P.H.
D. Re-exam before renewal
G. Prosthetic aid
K CDL vehicle W/O air brakes
S. School bus related functions only
U. Must be accompanied by farm service waiver card

SECTION 1. CHECK THE PROPER BOX FOR YOUR APPLICATION AND FILL OUT COMPLETELY

☐ Operator's License ☐ Learner's Permit ☐ CDL ☐ Class D Comm. Lic. ☐ ID Card ☐ Address change ☐ Name change

PRINT IN BLACK INK

Full Name of Applicant (Last Name) (First Name) (Middle/Maiden) (Circle if Appropriate) Jr. Sr. II III IV ___

Home Address (Use 911 Address) | **Social Security Number**

City State Zip County

SECTION 2. **MAILING ADDRESS (If Different from Home Address)**

Mailing Address

City State Zip

Date of Birth			Age	Race
Mo.	Day	Year		
Sex	Height	Weight	Eyes	Hair

SECTION 3. **ANSWER THE FOLLOWING QUESTIONS**

YES NO

1. ( ) ( ) Have you ever held a driver's license in any state? What state? _____ When? _____ D.L. Number _____
2. ( ) ( ) Has your license or driving privilege ever been suspended, revoked, or cancelled? When? _____ What state? _____
   For what reason? _____
3. ( ) ( ) Have you ever been denied a license? Why? _____
4. ( ) ( ) Do you have any physical defects which would interfere with your ability to operate a motor vehicle safely? Explain _____

I DO SOLEMNLY SWEAR / AFFIRM THAT I AM THE PERSON NAMED AND DESCRIBED HEREIN AND THAT THE STATEMENTS ON THIS APPLICATION ARE TRUE AND CORRECT.

X_____ _____
Usual Signature of Applicant Date

SECTION 4. **DO YOU WISH TO REGISTER TO VOTE ( ) YES ( ) NO IF YES GO TO SECTION 5**

Receipt No.			
L.P. Receipt No.			
Application Fee			
End. Receipt			
Gen. Knowledge			
Signs			
Air Brakes			
Combination			
Motorcycle			
Double/Triples			
Tanker			
Passenger			
Hazmat			
Pre-Trip			
Basic Control			
Road test			

Class of D.L.			
Endorsements			
Restrictions			
ID. Documents			
Acuity	L 20/	R 20/	B 20/
Acuity Corr.	L 20/	R 20/	B 20/
Depth		Color	
Examiner		Badge	

FOR USE BY NOTARY FOR ID CARD
Subscribed and sworn to before me,

Signature _____

Title _____ Seal

Date _____

SECTION 5. **VOTER DECLARATION - Read and Sign**

I swear / affirm that: I am a U.S. citizen. I will have lived in this state and county for at least 30 days before the election, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before the election. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Futhermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on the foregoing application for registration, and that I will faithfully support the Constitution of the United States and the State of Mississippi, and will bear true faith and allegiance to the same.

X_____ _____ _____
Signature (or mark) of applicant Date Daytime Telephone Number

X_____
If applicant is unable to sign, provide signature of person who signed for applicant.

WARNING: The penalty for conviction of false registration is a felony punishable by a fine of not more than Five (5) Thousand Dollars (5,000) or imprisonment for not more than five (5) years, or both.

If you were previously registered to vote under a different name or address, please give that name or address.

Last Name First Name Middle / Maiden

City / Town County State Zip Code

SECTION 1. CHECK THE PROPER BOX FOR YOUR APPLICATION AND FILL OUT COMPLETELY MV 11-94

☐ Operator's License ☐ Learner's Permit ☐ CDL ☐ Class D Comm. Lic. ☐ ID Card ☐ Address change ☐ Name change

PRINT IN BLACK INK

Full Name of Applicant (Last Name) (First Name) (Middle/Maiden) (Circle if Appropriate) Jr. Sr. II III IV

Home Address (Use 911 Address)

City State Zip County **Social Security Number**

SECTION 2 **MAILING ADDRESS (If Different from Home Address)**

Mailing Address

City State Zip

Date of Birth Mo. Day Year | Age | Race

SECTION 5. **VOTER DECLARATION – Read and sign**

I swear/affirm that: I am a U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X_____ _____
Signature (or mark) of applicant Date

X_____ _____
If applicant is unable to sign, the signature of the person who helped fill out this application is required. Daytime Telephone number

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

If you were previously registered to vote under a different name or address, please give that address.

Last Name First Name Middle/Maiden

City/Town County State Zip Code

This is a two-part form. The top portion is an application that may be used to register to vote. The bottom portion is your Driver License Renewal Notice.

Under the new Motor-Voter Law, you may apply to register to vote in Mississippi while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form and bring it with you to the driver license office. Your registration form will be forwarded to your local circuit clerk who will notify you of your voter status. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes. If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes.

If you wish only to renew your license, bring this entire form (uncompleted) with you and present it at the driver license office.

This voter registration form may also be used to change your address and/or you name on your existing voter registration file. Be sure to indicate if this application is for a new registration address change, or name change by checking the appropriate box(s) below.

SECTION 1. | | **NEW REGISTRATION** | | **ADDRESS CHANGE** | | **NAME CHANGE**

Mr. Mrs. Miss Ms. (Last Name) (First Name) (Middle/Maiden) (Circle If Appropriate) Jr. Sr. II III IV

Home Address (Use 911 Address) **Social Security Number**

City County State Zip

Mailing Address (If Different from home address) Date of Birth Mo. Day Year Race

City State Zip

If you were previously registered to vote under a different name or address, please list that name or address.

Last Name First Name Middle/Maiden

City/Town County State Zip

SECTION 2. **VOTER DECLARATION Read and Sign**

I swear/affirm that: I am an U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X _____ Signature (or mark) of applicant _____ Date

X _____ If applicant is unable to sign, the signature of the person who helped fill out this application is required. _____ Date

_____ Daytime Phone number(s) where applicant can be reached.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

ISSUE DATE | EXPIRATION DATE | WT.

HT. | CLASS | RESTR. | ENDORSEMENTS

X _____

THIS IS YOUR MISSISSIPPI DRIVER'S LICENSE RENEWAL NOTICE. TAKE THIS CARD TO YOUR LOCAL DRIVER'S LICENSE OFFICE FOR RENEWAL PRIOR TO THE EXPIRATION DATE OF YOUR CURRENT LICENSE. TO EXPEDITE YOUR RENEWAL, PLEASE READ AND FOLLOW THE INSTRUCTIONS BELOW:

(1) Do not fold, mutilate, or write on this card, as it must be photographed;

(2) Check the personal information and if corrections are needed, inform the agent in Driver's License Office at the time of renewal. **DO NOT MAKE THE CORRECTIONS YOURSELF;** and

(3) You will pay the proper fee, have your picture taken, and recieve your driver license by mail.

NOTICE

Checks dishonored for any reason will result in the cancellation of the renewal license. A charge for reinstatement, plus the amount of your dishonored check must be paid before you can regain you privilege to drive.

Mississippi Voter Registration Application MV 11-94

"If you are not registered to vote where you now live, would you like to apply tor register to vote here today?"

☐ **Yes** ☐ **No** **Signature**_____ **Date**_____

If you do not check a box, you will be considered to have decided not to register to vote at this time.

Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency. If you would like help filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private. If you believe someone has interfered with your right to register or decline to register to vote or your right to privacy in deciding whether to register or in applying to register to vote, you may file a complaint with the Secretary of State at 401 Mississippi St., Jackson, MS 39201 or by calling 1-800-xxx-xxxx.

If you decline to register to vote, that decision will remain confidential and will only be used for registration purposes. If you choose to register to vote, information regarding the office through which you applied will remain confidential and will only be used for registration purposes.

SECTION 2. **COMPLETE THIS SECTION**

Mr. Mrs. Miss Ms. (Last Name) (First Name) (Middle/Maiden) (Circle If Appropriate) Jr. Sr. II III IV ____

Home Address (Use 911 Address) **Social Security Number**

City County State Zip

Mailing Address (If Different from home address) Date of Birth Mo. Day Year Race (optional)

City State Zip

SECTION 3. IF YOU WERE PREVIOUSLY REGISTERED UNDER A DIFFERENT NAME OR ADDRESS, LIST THAT NAME OR ADDRESS

Last Name First Name Middle/Maiden

Street

City/Town County State Zip

SECTION 4. **VOTER DECLARATION Read and Sign**

I swear/affirm that: I am an U.S. citizen. I will have lived in this state and county for at least 30 days before voting, and if a resident of a municipality, I will have lived in the municipality for at least 30 days before voting. I have never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy, or I have had my rights restored as required by law. I have not been declared mentally incompetent by a court. Furthermore, I certify that I am at least eighteen (18) years old (or I will be before the next general election), the information given by me is true and correct and that I have truly answered all questions on this application for registration, and that I will faithfully support the constitution of the United States and of the State of Mississippi and will bear true faith and allegiance to the same.

X_____ _____

Signature (or mark) of applicant Date

X_____ _____

If applicant is unable to sign, the signature of the person who helped fill out this application is required. Date

_____

Daytime Phone number(s) where applicant can be reached.

WARNING: False registration is a felony. The penalty for conviction is imprisonment for not more than five (5) years or fine of not more than five thousand dollars ($5,000) or both.

For Office Use Only

MV 11/94

Agency Form (handwritten notation)

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OFFICE OF THE MISSISSIPPI SECRETARY OF STATE

[SEAL]

July 1994

Status Report on National Voter Registration Act

Presented by
Elections Division
Constance Slaughter-Harvey
Assistant Secretary of State

STATE OF MISSISSIPPI: IMPLEMENTATION OF THE NATIONAL VOTER REGISTRATION ACT

Working Together

Mississippi has been utilizing the talents of its diverse citizenry in its journey toward full implementation of the National Voter Registration Act (NVRA) in January 1995.

The NVRA Implementation Committee, created by the Governor's Executive order #739 in December 1993, is committed to ensuring Mississippi's compliance and educating the public. The NVRA Working Group has established effective administrative procedures for the motor-voter and agency-based registration programs. The Elections Reform Task Force, sponsored by the office of the Secretary of State, is providing input on mail-in registration, as well as the list maintenance and fail-safe voting issues.

Motor-Voter

Processing voter registration applications will not be new to Mississippi's Department of Public Safety. A voluntary motor-voter program was instituted in July 1992 along with mail-in registration. This program will be enhanced by a new form which will allow the individual to apply for a driver's license and voter registration simultaneously. The renewal notice mailed to an individual's home will have a voter application attached. Records of an individual's decision to apply or decline

will be kept confidential on computer for two years. Since Mississippi has a driver's license office in all but two counties, applications will be transmitted from the local office to the local registrar. Hand-delivery is anticipated to be the method of transmittal.

Agency-Based Registration

Representatives from the targeted agencies have embraced the task of implementing office procedures that will incorporate the NVRA requirements and accommodate applicants. The agency voter registration form will consist of a detachable declination form containing the required wording and a registration application similar to the mail-in form. The declination forms will be stored at the agency offices in a separate file. Most of the agencies will transmit applications from the local office to the local registrar. Those with regional offices are considering sorting applications collected in the field and routing them to the proper registrars. Methods of transmittal will include hand-delivery, regular mail, and certified mail.

[2] Mail-in Registration

Mississippi's mail-in registration program has been in place for two years, with successful results. During the 1994 legislative session, the mail-in registration deadline was changed from 60 days to 30 days. The mail-in form will be redesigned to make it more reader-friendly and to comply with the Federal Election Commission's Rules and Regulations regarding content.

Training/Public Information

Various forums have been utilized to educate Mississippi's elections officials, other public officials, and the public about the NVRA. These forums have included statewide conventions, publications, and the Fifth Annual Voter Awareness Conference, sponsored by the Elections Division of the Secretary of State's Office. A public information campaign will be a part of Mississippi's educational efforts.

Formal NVRA training efforts kick off July 14 at the Circuit Clerk's Statewide Convention. This will be followed by regional training sessions for the Election Commissioners Association of Mississippi. Using a train-the-trainer approach, the Elections Division will train key Department of Public Safety and Agency personnel, who will, in turn, train their office personnel and implement their new office procedures.

Legislation

A few non-conforming state statutes remain. These include an attesting witness requirement on the mail-in form and the option to purge a registrant's name for failing to vote in four years. Attached is a list of the required statute changes and additions.

The Implementation Committee, which includes the chairs of both the House and Senate Elections Committees, is proceeding with the full and timely implementation of the NVRA, and fully expects the non-conforming technicalities in state law to be corrected swiftly when the state legislature reconvenes in January.

"Comparing Notes"

Throughout this process, the staff of the Elections Division has paid close attention to the NVRA activities in other states, and has consulted many about their implementation plans. These statues include Tennessee, Alabama, Georgia, Florida, New York and Louisiana, which have all passed their conforming legislation. They have been generous in sharing their ideas and their work on the required forms and procedures. The Elections Division will continue to consult other states, and is in the process of planning some on-site visits.

[3] State of Mississippi Compliance with the NVRA

Mississippi Statute Changes

Section 23-15-43

Include automatic review of those denied registration using mail-in, motor-voter or agency registration applications.

Section 23-15-45

Registrars must send an acknowledgment notice informing applicants of the disposition of their application.

Section 23-15-47

The mail-in registration form may request only information determined "necessary" for registration by the Federal Election Commission (FEC).

The attesting witness requirement on the mail-in form must be repealed.

Forms similar in content to the mail-in form must be made available through driver's license offices, designated public agencies and Armed Forces recruitment offices.

The federal mail-in form must be accepted.

Section 23-15-153

Change deadline for revision of registration lists from 60 days before the election to 90 days.

Section 23-15-159

Repeal discretion to remove names of persons who have not voted in 4 years.

Sections 23-15-13, -14, and -573

Amend to conform to fail-safe election day provisions.

New Legislation

Make NVRA provisions applicable to state and local elections to avoid a dual registration system.

Outline legal requirements for administration of motor-voter and agency-based registration programs.

Ensure confidentiality of registration source for those who apply through the motor-voter and agency programs.

[4] Establish complaint procedures for motor-voter and agency-based programs.

Establish recordkeeping and reporting procedures.

Establish provisions for a general list maintenance program, including active measures to discover changes of address, and procedures for purging.

Remove names only upon conviction of a disenfranchising crime, declaration of mental incapacitation, death, or written notification of a change to an address outside the registrar's jurisdiction.

Establish procedures for placing a registrant on the new inactive list, and their removal from the voter roll if they fail to respond to a required confirmation notice and from the date of that notice, fail to vote in two subsequent federal general elections.

Establish fail-safe election day provisions designating the polling place where those who qualify should vote.

Mississippi

[SEAL]

Election Update

SECRETARY OF STATE DICK MOLPUS
NOVEMBER 1994 VOL. 5 NO. 2

New election law goes into effect

Mississippi's new election law – House Bill 1809 – is in effect, with the November general election its first time to be used.

H.B. 1809 was passed by the 1994 Legislature but could not be put into effect until the U.S. Justice Department pre-cleared it. When that occurred Sept. 6, the result was great confusion among candidates and elections administrators.

The questions were quick and wide-ranging:

- Who is eligible to run?
- Can more people qualify?
- What about the party primaries in June?

And on, and on.

Secretary of State Dick Molpus said judicial candidates throughout Mississippi "must be the most frustrated people alive" because of the difficulties they had to deal with through two different qualifying periods, party elections, and the aftermath of H.B. 1809's taking effect to void the results of those party elections.

The good news: during the candidate qualifying period this spring, the Secretary of State's Office strongly advised all judicial candi-

Continued on Page [79]

'95 qualifying date March 1

Candidates who want to run for most state, county, and county-district offices must qualify by March 1 – with the pre-clearance of New Election Law H.B. 1809.

Previously, the qualifying deadline was keyed to 60 days prior to the primary election date.

This law as passed during the 1994 legislative session and established non-partisan judicial elections. The U.S. Justice Department pre-cleared the change Sept. 6.

The new qualifying date becomes effective Jan. 1, 1995.

This change is reflected in Miss. Code Ann § 23-15-299 and will not apply to municipal offices.

All party candidates and all independent candidates must file their qualifying statements, qualifying fees or petitions by 5 p.m. March 1 of the year in which they wish to run.

Secretary of State Dick Molpus urged election administrators to inform their constituents about this change.

NVRA to take effect Jan. 1

'Motor Voter' hearings set

Hearing on Mississippi's draft legislation for compliance with the National Voter Registration Act will be held

at the Capitol in November, said Sen. Kay Cobb of Oxford, chair of the Senate Elections Committee.

Senator Cobb said the hearing will be held in Room 216 from 10:30 a.m. to 5 p.m. Nov. 16 and from 8:30 a.m. to 4:30 p.m. Nov. 17, during a joint meeting with the House Apportionment and Elections Committee.

"The hearings will be open to anyone interested in attending." she said.

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VOTE FOR MISSISSIPPI'S FUTURE

Mississippi Election Update **Page 2**

State gearing up for 'Motor Voter'

Mississippi is in the final stages of preparation for the National Voter Registration Act (NVRA), commonly known as the "motor voter" law, which is slated to go into effect throughout the country in January.

In Mississippi, NVRA plans have been carefully developed through consultation with election officials and representatives from the affected state agencies, including the Highway Patrol, the Department of Health, the Department of Human Services, the Department of Rehabilitation Services, and Division of Medicaid.

Mississippi's mail-in registration form is being redesigned to comply with federal rules and to make it easier to use.

Legislation to bring Mississippi into compliance has been drafted and final drafts of the motor voter and

agency-based registration forms are expected to be ready by mid-October. Mississippi's mail-in registration form is being redesigned to comply with federal rules and to make it easier to use.

Information on the NVRA was presented to the Circuit Clerks Association and the Election Commissioners Association of Mississippi in July.

The Secretary of State's Elections Division is planning an additional training session for circuit clerks and the chairs of the county election commissions. Training sessions for agency personnel on their NVRA responsibilities are scheduled for October and November.

Under NVRA, Mississippians will be able to apply to register to vote at driver's license examining stations, state agencies that provide public assistance, state agencies that provide services primarily to the disabled, and Armed Forces recruiting offices. These offices will forward the applications to the proper circuit clerk.

Committee leads the way to develop 'Motor Voter'

Mississippi's NVRA Implementation Committee, created by Executive Order in December 1993, is charged with the task of ensuring Mississippi's compliance with this far-reaching act.

Members of the committee are: Ms. Mary Bankston, member at-large; Tommy Bond, director, Division of Economic Assistance; Ms. Gwen Clinton, Election Commissioners Association of Mississippi; Rep. Bill Denny, chairman of the House Apportionment and Elections

Committee; Ms. Therese Hanna, director of policy and planning, Mississippi Department of Health; Greg Hinkebein, Office of the Governor; Joe Martin, Mississippi Circuit Clerks Association;

Leslie Southwick, member at-large; the Rev. Rims Barber, Mississippi Democratic Party; Phil Carter, special assistant attorney general; Sen. Kay Cobb, chairman of the Senate Elections Committee; Maj. Ron Ford, director of Driver Services, Department of Public Safety; Ms. Constance Slaughter-Harvey, assistant secretary of state for Elections; Bill Jordan, member at-large; Jerry Sawyer, director, Division of Vocational Rehabilitation; Chris Webster, executive director, Mississippi Republican Party; and Terrence Williams, Federal Voting Assistance Program.

Poll worker's pay exemption in '95

A new federal law, which goes into effect in January, will raise the Social Security and Medicare exclusions for election workers from $100 to $1,000 per calendar year.

H.B. 4277 – the "Social Security Independence and Program Improvements Act of 1994" – was passed by Congress in August. The law also contains an inflation index that will raise the exemption amount beginning in the year 2000.

Because the law does not go into effect until 1995, poll workers who serve at the 1994 general election **are still subject** to the $100 exemption limit.

Election:

Continued from Page [75]

dates to qualify twice – once for the scheduled June primaries, if they were party candidates, and again by May 6 in the event that H.B. 1809 was approved by Justice.

Nearly every candidate who qualified by the first deadline, April 6, also qualified under the proposed non-party rules, Elections Division reports indicated.

Now, it's on to the general election in November when ballots statewide will contain the names of candidates for:

- Federal posts of U.S. Senator and U.S. House of Representatives
- A constitutional amendment
- 10 new Court of Appeals seats
- Chancery judges races, including 6 new chancellors
- Circuit judges races, including 8 new judges

If a run-off is necessary, it will be held Nov. 22.

In the Southern Supreme Court District, the ballot will reflect one race for which incumbent Chuck McRae is the only candidate.

The new law also provides that if the senior chancellor in the district wants to appoint a family master, he or

she must inform the Supreme Court's chief justice for approval.

Legal assistance for district attorneys were approved in eight circuit districts.

Judicial candidates, from now on, must be non-party and distance themselves from political party activity or relationships, said Reese Partridge, senior attorney with the Elections Division. "I know some questions are bound to come up about this non-party status, so I urge anyone with questions to contact us," he said.

The 'Herd' Method

Chancellors and circuit judges in some multi-judge districts will be elected by the "herd" method – a mathematical formula developed to help decide what the margin of victory is.

For chancellors, that includes 1st, 6th, 12th, and 18th districts.

For circuit judges, that includes 1st, 3rd, 5th, 10th, 14th, 15th, 16th, and 20th districts.

Here is how the math works:

1. Total up votes for all candidates. Divide by the number of judgeships available, then divide by 2.

2. No run-off is necessary if the number of candidates with votes greater than the majority is equal to or greater than the number of judgeships. If there are more candidates over the majority than there are judgeships, the winners are the top voter-getters, equal in number to the number of judgeships.

3. A run-off is necessary when the number of candidates with votes greater than the majority is less than the number of judgeships. While the candidates with more than the majority are elected, the number of candidates going into the run-off is determined by multiplying the number of remaining judgeships by 2. Those candidates with the next-highest vote totals have their names submitted to the run-off.

Election Task Force Prepares Proposals

The Elections Reform Task Force has been busy preparing proposals for the 1995 Legislative Sessions – meeting in June, August and September to formulate its agenda.

Proposals will include a campaign finance reporting threshold of $200 in aggregate for all candidates and committees and to require state certification of voting machines. State certification would require vendors to prove their equipment meets the requirements of the Mississippi Code.

Also, the Task Force will recommend changes to correct several contradictory or confusing sections of the code, especially statutes dealing with ballot write-in provisions and with contesting qualifications of a candidate.

Task Force members have expressed strong support for Mississippi's compliance with the National Voter Registration Act. Recommendations related to the NVRA include making the state mail-in voter application form a self-mailer with the addresses of all circuit clerks listed on the back.

The Task Force continues to support changing the school bond issue passage threshold from 60 percent to a simple majority and consolidating special elections to fill vacancies with the November election.

Mississippi Election Update **Page 4**

Students, agency cooperating on voter registration

Beginning a tradition of voting – that's what the Mississippi Secretary of State's Office has been nurturing this summer and fall working with students, administration and faculty throughout the state to register students to vote.

This summer a group of students called "Southern Echo" met with members of the Elections Division in hopes of establishing a viable voter registration and education program targeted toward college students. "Southern Echo" is comprised of students from colleges and universities throughout the state searching for ways to motivate students to register and vote.

Following the visit, "Southern Echo" and the Elections Division began developing a plan to conduct voter registration and education drives on state campuses.

The first phase of the program was to work with all two- and four-year colleges, public and private, in an effort to educate students on the values of voting and participating in the upcoming November elections. Staff members worked with orientation directors, registrars, and student governments in conducting voter registration.

More than 3,000 college students from 19 schools across the state have participated in the program. Staff members from the Secretary of State's office were on hand to speak to students, as well as to answer technical questions about mail-in voter registration laws.

Elections Division staff to contact:
601-359-6357 or 1-800-829-6786

- **Constance Slaughter-Harvey,** Assistant Secretary of State for Elections and General Counsel
- **Jesse Griffin,** Elections Bureau Director
- **Reese Partridge,** Staff Attorney
- **Jim Mangum,** Special Projects Officer
- **Gary Harris,** Special Projects Officer
- **Cora Jones,** Administrative Assistant
- **Lane Rosson,** Legal Clerk
- **Kate Margolis,** NVRA Coordinator
- **Angela Brooks, Quemardo Castilla** and **Margo Carr,** Interns

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Election Addresses, telephone numbers:

Secretary of State's Office
Elections Division
401 Mississippi St.
P.O. Box 136
Jackson MS 39205
(601) 359-6357
Toll-free 800-829-6786

U.S. Department of Justice
Civil Rights Div., Voting Sect.
Room 716, 320 1st Street, N.W.
Washington DC 20001
(202) 724-5897

U.S. Voting Assistance
Pentagon, Room 1B457
Washington DC 20301-1155

Democratic Party of Miss.
P.O. Box 1583
Jackson MS 39216-1583
(601) 969-2913

Miss. Republican Party
P.O. Box 60
Jackson MS 39215-0060
(601) 948-5191

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[SEAL] **DICK MOLPUS**
SECRETARY OF STATE
PO BOX 136
JACKSON MS 39205

PART FOUR - STATE LEGISLATION

Summary

The NVRA Implementation Committee, created by the governor's Executive Order No. 739 in December 1993, is charged with ensuring Mississippi's compliance with the Act, and with drafting any needed compliance legislation.

Draft legislation was completed in August. The Senate Elections Committee held a hearing on the NVRA on November 16, 1994 at the State Capitol. The hearing was open to the public. Secretary of State Staff presented an overview of the requirements of the federal law and a page-by-page walk-through of the draft legislation.

Included in this section:

- list of people who attended the hearing
- summary of discussion at the hearing
- testimony of the League of Women Voters of Mississippi
- testimony of the Elections Reform Task Force
- draft legislation
- the membership of the various committees that have worked on NVRA implementation

MISSISSIPPI LEGISLATURE REGULAR SESSION 1995

By: Senator(s) Cobb To:

SENATE BILL NO. ___

* * *

SECTION 4. (1) County registrars shall receive valid voter registration applications forwarded by voter registration agencies and the Department of Public Safety and shall place the name of the persons whose valid applications have been forwarded to them twenty-five (25) days before any election on the pollbook so that such voter may vote at such election if the applicant is otherwise qualified to register to vote in the county.

(2) If the application indicates that the applicant lives within the corporate limits of a municipality within the registrar's county, the county registrar shall forward a duplicate copy of the application for registration and any changes to such registration when they occur, either by certified mail to the clerk of the applicant's present home address or by personal delivery to such clerk, provided that a numbered receipt is signed by such clerk in return for the described documents. Upon receipt of the copy of the application for registration or changes to such registration, the clerk of the municipality shall register the applicant as a municipal elector and make a determination of the municipal voting precinct in which the applicant shall be registered to vote if a review of the application indicates that the applicant meets all the criteria necessary to qualify as a municipal elector. The clerk shall send this municipal voting precinct information by United States first class mail, postage prepaid, to the applicant at the address provided on the application. Any and all mailing costs incurred by the county registrar or

the clerk of the municipality in effectuating this subsection shall be paid by the governing authority of the municipality. If a review of the copy of the application indicates that the applicant is not qualified to vote in the municipality, the clerk of the municipality shall deny the application and notify the applicant.

(3) The registration date for a valid application made through a driver's license examining station or a voter registration agency shall be the date when the application is made.

* * *

SECTION 7. (1) Each county registrar shall ensure than any qualified applicant for voter registration is registered to vote. Once a voter is registered, the name of that voter shall not be removed from the registration books and pollbooks except (a) at the written request of the voter, (b) by reason of the voter's conviction of a disenfranchising crime as provided in Section 241, Mississippi Constitution of 1890, or as may be provided by legislation adopted pursuant to Section 244-A, Mississippi Constitution of 1890, (c) by reason of adjudication of the voter as mentally incapacitated with respect to voting, (d) by death of the voter, or (e) pursuant to a registration book and pollbook maintenance program or other registration book and pollbook maintenance activity conducted pursuant to law.

(2) Information received by an election commission from an election official in another jurisdiction indicating that a voter in the election commission's county has registered to vote in another jurisdiction shall be considered as a written request from the voter to have the voter's name

removed from the registration books and pollbooks of the election commission's county.

(3) Each election commission shall maintain for at least two (2) years, and make available for public inspection and copying, all records concerning implementation of registration book and pollbook maintenance programs and activities conducted pursuant to Section 9 of this act. The records shall include lists of the name and address of each person to whom an address confirmation final notice was sent and information as to whether each such person responded to the mailing, but shall not include any information that is confidential or exempt from the Mississippi Public Records Act of 1983.

SECTION 8. The Secretary of State shall prescribe certain registration book and pollbook maintenance forms to be u[illegible] by the election commission, which shall include:

(a) An address confirmation which shall be a nonforwardable mailing that shall contain the voter's name and address of legal residence as shown on the voter registration record and shall contain a request that the election commission be informed if either the name or the address of legal residence of the voter is incorrect.

(b) An address confirmation final notice, which shall be sent by forwardable mail and shall contain a postage prepaid pre-addressed return form and shall contain language which states the equivalent of the following:

(i) That if the voter has not changed his or her address of legal residence or has changed address of

legal residence within the county, or has changed his or her legal name, the voter should return the return form within thirty (30) days after the date of the notice.

(ii) That if the return form is not returned and the voter does not offer to vote by the second federal general election thereafter, the voter's name will be removed from the voter registration books.

(iii) That if the voter has changed his or her address of legal residence to a location outside the county the voter should return the form, which will serve as a request to be removed from the registration books, and the voter will be provided with information on how to register in the new jurisdiction in order to be eligible to vote.

(iv) That if the card is not returned, the voter may be required to vote by affidavit ballot in any subsequent election up to the second federal general election after the confirmation mailing is sent.

SECTION 9. (1) County election commissions shall conduct an ongoing general registration book and poll-book maintenance program to protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records. The program must be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965.

(2) County election commissions shall incorporate one or both of the following procedures in their registration list maintenance program: (a) a procedure by which change-of-address information supplied by the United

States Postal Service through its licensees is used to identify registered voters whose addresses might have changed, or (b) a procedure by which change-of-address information is identified from returned nonforwardable return-if-undeliverable mail sent to all registered voters in the county.

(3) A registration book and pollbook maintenance program shall be conducted by each election commission at least once each year and shall be completed not later than ninety (90) days prior to the date of any federal election. A voter's name may not be removed from the registration books or pollbooks later than ninety (90) days prior to the date of a federal election; provided, however, that nothing in this section shall prohibit the removal of the name of a voter from the voter registration books and pollbooks at any time and without prior notification, upon the written request of the voter, by reason of conviction of the voter of a disenfranchising crime, by reason of adjudication of the voter as mentally incapacitated with respect to voting, by reason of the death of the voter or by failure of the voter to meet any other qualification required of persons to vote.

(4)(a) If the county election commission receives change-of-address information from one of the procedures authorized in subsection (2) of this section or from jury notices returned to the courts, that indicates the voter has moved from one location to another within the registrar's county, the election commission shall change the registration records to show the new address and shall send the voter a notice of the change by forwardable mail on which the registrant may verify or correct the address information.

(b) If the county election commission receives change-of-address information from one of the procedures authorized in subsection (2) of this section or from jury notices returned to the courts that indicates the voter has moved outside the registrar's county or receives change-of-address information that contains no forwarding address, the county election commission shall send an address confirmation final notice to the last known address of the voter and designate the voter as inactive. The registrar shall redesignate the voter as active if, within the next two (2) federal general elections after the address confirmation final notice is sent, the voter (i) returns the postage prepaid pre-addressed return form and indicates that his residence is in the registrar's county, (ii) votes by affidavit ballot in the registrar's county as authorized by subsection (5) of this section at an election that is conducted in the registrar's county, (iii) changes his or her voter registration to another location in the registrar's county, or (iv) properly requests an absentee ballot for an election that is conducted in the registrar's county. If the voter is not redesignated as active within the next two (2) federal general elections after the address confirmation final notice is sent, the county election commission shall remove the voter from the registration books and poll-books.

(5) A voter who has been designated as inactive may vote at the precinct in which he or she resides by affidavit ballot at any election that occurs within the next two (2) federal general elections after the address confirmation final notice is sent, and may change his or her

name or address of legal residence at the polls by completing the affidavit ballot.

(6) Voters designated as inactive shall not be used to calculate the number of signatures needed on any petition.

* * *

SECTION 16. Section 23-15-11. Mississippi Code of 1972, is amended as follows:

23-15-11. Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upwards, who has resided in this state for thirty (30) days and for thirty (30) days in the county in which he offers to vote, and for thirty (30) days in the incorporated city or town in which he offers to vote, and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never been convicted of any crime listed in Section 241, Mississippi Constitution of 1890, shall be a qualified elector in and for the county, municipality and voting precinct of his residence, and shall be entitled to vote at any election. No others than those above included shall be entitled, or shall be allowed, to vote at any election.

SECTION 17. Section 23-15-13, Mississippi Code of 1972, is amended as follows:

23-15-13. An elector who moves from one ward or voting precinct to another ward within the same municipality or voting precinct within the same *county* shall not be disqualified to vote, but he shall be entitled to have his

registration transferred to his new ward or voting precinct upon making written request therefor at any time up to thirty (30) days prior to the election at which he offers to vote, and if the removal occurs within thirty (30) days of such election he shall be entitled to vote in his new ward or voting precinct by affidavit ballot as provided in Section 23-15-573.

SECTION 18. Section 23-15-47, Mississippi Code of 1972, is amended as follows:

{Until Section 1, Chapter 600, Laws of 1994, is effectuated under Section 5 of the Voting Rights Act of 1965, this section shall read as follows:}

23-15-47. (1) Any person who is qualified to register to vote in the State of Mississippi may register to vote by mail-in application in the manner prescribed in this section.

(2) The following procedure shall be used in the registration of electors by mail:

(a) Any qualified elector may register to vote by mailing or delivering a completed mail-in application to his county registrar at least sixty (60) days prior to any election. The postmark date of a mailed application shall be the date of registration. *An* applicant is subject to the penalties provided in Section 23-15-17 for false registration. Any person who willfully swears falsely to any material matter on a mail-in application is guilty of perjury and, upon conviction thereof, shall be punished as provided in Section 97-9-61.

(b) Upon receipt of a mail-in application, the county registrar shall stamp such application with the

date of receipt. Within twenty-five (25) days of receipt of a mail-in application, the county registrar shall complete action on the application, including any attempts to notify the applicant of the status of his application.

(c) If the county registrar determines that the applicant is qualified and his application is legible and complete, he shall mail the applicant written notification that the application has been approved, specifying the county voting precinct, polling place and supervisor district in which such person shall vote. This written notification of approval containing the specified information shall be the voter's registration card. Said registration cards shall be provided by the county registrar. The registrar shall assign a voter registration number to such person, which shall be that person's Social Security number if such a number is provided, and said voter registration number shall be clearly shown on the application and on the written notification of approval. In mailing such written notification, the county registrar shall note the following on the envelope: "DO NOT FORWARD." If any registration notification form is returned as undeliverable, the voter's registration shall be void.

(d) A mail-in application shall be rejected for any of the following reasons:

(i) An incomplete portion of the application which makes it impossible for the registrar to determine the eligibility of the applicant to register;

(ii) A portion of the application which is illegible in the opinion of the county registrar and makes it impossible to determine the eligibility of the applicant to register;

(iii) The county registrar is unable to determine, from the address and information stated on the application, the precinct in which the voter should be assigned or the supervisor district in which he is entitled to vote;

(iv) The applicant is not qualified to register to vote pursuant to Section 23-15-11;

(v) The registrar determines that the applicant is registered as a qualified elector of the county.

(e) If the mail-in application of a person is subject to rejection for any of the reasons set forth in paragraphs (d)(i) through (iii) of this subsection, and it appears to the registrar that the defect or omission is of such a minor nature and that any necessary additional information may be supplied by the applicant over the telephone or by further correspondence, the registrar may write or call the applicant at the telephone number provided on the application. If the registrar is able to contact the applicant by mail or telephone, he shall attempt to ascertain the necessary information and if this information is sufficient for the registrar to complete the application, the applicant shall be registered. If the necessary information cannot be obtained by mail or telephone or is not sufficient, the registrar shall give the applicant written notice of the rejection and provide the reason for such rejection. The registrar shall further inform the applicant that he has a right to attempt to register by appearing in person or by filing another mail-in application.

(f) If a mail-in application is subject to rejection for the reason stated in paragraph (d)(v) of this subsection and the "present home address" portion of the application is different from the residence address for the applicant found in the registration book, the mail-in application shall be deemed a written request to transfer registration pursuant to Section 23-15-13. Subject to the time limits and other provisions of Section 23-15-13, the registrar or the election commissioners shall note the new residence address on his records and, if necessary, transfer the applicant to his new precinct, advise the applicant of his new precinct, polling place and supervisor district, and notify the municipal clerk of any such changes on a monthly basis.

(3) The instructions and the application form for voter registration by mail shall be *prescribed by the Secretary of State* and shall contain, *at a minimum,* the information *required of certain other voter registration applications by Section 5 of Senate Bill No. ___, 1995 Regular Session.*

(4)(a) The Secretary of State shall prepare and furnish without charge the necessary forms for application for voter registration by mail to each county registrar, municipal clerk, all public schools, each private school that requests such applications, and all public libraries.

(b) Bulk quantities of forms for application for voter registration by mail shall be furnished by the Secretary of State to any person or organization. The Secretary of State *may* charge a person or organization the actual cost he incurs in providing bulk quantities of forms for application for voter registration to such person or organization.

(5) The originals of completed mail-in applications shall remain on file in the office of the county registrar in accordance with Section 23-15-113. Nothing in this section shall preclude having applications on microfilm or microfiche.

(6) If the *mail-in application indicates that the applicant lives within the corporate limits of a municipality within the registrar's county,* the county registrar shall forward notice of registration, a duplicate copy of the application for registration, and any changes to such registration when they occur, either by certified mail to the clerk of the municipality indicated in the *application* or by personal delivery to such clerk, provided that a numbered receipt is signed by such clerk in return for the described documents. Upon receipt of the copy of the application for registration or changes to such registration, the clerk of *the* municipality shall register the applicant as a municipal elector and make a determination of the municipal voting precinct in which the person making the application shall be required to vote if a review of same indicates that the applicant meets all the criteria necessary to qualify as a municipal elector. The clerk shall send this municipal voting precinct information by United States first class mail, postage prepaid, to *the applicant* at the address provided on the application. Any and all mailing costs incurred by the county registrar or the clerk of the municipality in effectuating this subsection shall be paid by the governing authority of such municipality. If a review of the copy of the application for registration or changes to such registration indicates that the applicant is not qualified to vote in *the* municipality, the clerk of *the* municipality shall deny such application and notify applicant.

(7) If the *application indicates that the applicant has registered to vote in another county or state,* the registrar or clerk shall send written notice of this new registration by regular United States mail to the registrar or clerk of the county stated *by the voter* as the voter's previous place of registration. The information shall include the complete name, address and age of the voter and shall include the Social Security number of such voter if it has been previously supplied. The election commission of the voter's previous place of registration shall be responsible for having such voter's name erased from the appropriate registration book and pollbook.

{From and after the date Section 1, Chapter 600, Laws of 1994, is effectuated under Section 5 of the Voting Rights Act of 1965, this section shall read as follows:}

23-15-47. (1) any person who is qualified to register to vote in the State of Mississippi may register to vote by mail-in application in the manner prescribed in this section.

(2) The following procedure shall be used in the registration of electors by mail:

(a) Any qualified elector may register to vote by mailing or delivering a completed mail-in application to his county registrar at least thirty (30) days prior to any election. The postmark date of a mailed application shall be the date of registration. *An* applicant is subject to the penalties provided in Section 23-15-17 for false registration. Any person who willfully swears falsely to any

material matter on a mail-in application is guilty of perjury and, upon conviction thereof, shall be punished as provided in Section 97-9-61.

(b) Upon receipt of a mail-in application, the county registrar shall stamp such application with the date of receipt. Within twenty-five (25) days of receipt of a mail-in application, the county registrar shall complete action on the application, including any attempts to notify the applicant of the status of his application.

(c) If the county registrar determines that the applicant is qualified and his application is legible and complete, he shall mail the applicant written notification that the application has been approved, specifying the county voting precinct, polling place and supervisor district in which such person shall vote. This written notification of approval containing the specified information shall be the voter's registration card. Said registration cards shall be provided by the county registrar. The registrar shall assign a voter registration number to such person, which shall be that person's Social Security number if such a number is provided, and said voter registration number shall be clearly shown on the application and on the written notification of approval. In mailing such written notification, the county registrar shall note the following on the envelope: "DO NOT FORWARD." If any registration notification form is returned as undeliverable, the voter's registration shall be void.

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(ii) A portion of the application which is illegible in the opinion of the county registrar and makes it impossible to determine the eligibility of the applicant to register;

(iii) The county registrar is unable to determine, from the address and information stated on the application, the precinct in which the voter should be assigned or the supervisor district in which he is entitled to vote;

(iv) The applicant is not qualified to register to vote pursuant to Section 23-15-11;

(v) The registrar determines that the applicant is registered as a qualified elector of the county.

(e) If the mail-in application of a person is subject to rejection for any of the reasons set forth in paragraphs (d)(i) through (iii) of this subsection, and it appears to the registrar that the defect or omission is of such a minor nature and that any necessary additional information may be supplied by the applicant over the telephone or by further correspondence, the registrar may write or call the applicant at the telephone number provided on the application. If the registrar is able to contact the applicant by mail or telephone, he shall attempt to ascertain the necessary information and if this information is sufficient for the registrar to complete the application, the applicant shall be registered. If the necessary information cannot be obtained by mail or telephone

or is not sufficient, the registrar shall give the applicant written notice of the rejection and provide the reasons for such rejection. The registrar shall further inform the applicant that he has a right to attempt to register by appearing in person or by filing another mail-in application.

(f) If a mail-in application is subject to rejection for the reason stated in paragraph (d)(v) of this subsection and the "present home address" portion of the application is different from the residence address for the applicant found in the registration book, the mail-in application shall be deemed a written request to transfer registration pursuant to Section 23-15-13. Subject to the time limits and other provisions of Section 23-15-13, the registrar or the election commissioners shall note the new residence address on his records and, if necessary, transfer the applicant to his new precinct, advise the applicant of his new precinct, polling place and supervisor district, and notify the municipal clerk of any such changes on a monthly basis.

(3) The instructions and the application form for voter registration by mail shall be *prescribed by the Secretary of State* and shall contain, *at a minimum*, the information *required of certain other voter registration applications by Section 5 of Senate Bill No. ___, 1995 Regular Session.*

(4)(a) The Secretary of State shall prepare and furnish without charge the necessary forms for application for voter registration by mail to each county registrar, municipal clerk, all public schools, each private school that requests such applications, and all public libraries.

(b) Bulk quantities of forms for application for voter registration by mail shall be furnished by the Secretary of State to any person or organization. The Secretary of State *may* charge a person or organization the actual cost he incurs in providing bulk quantities of forms for application for voter registration to such person or organization.

(5) The originals of completed mail-in applications shall remain on file in the office of the county registrar in accordance with Section 23-15-113. Nothing in this section shall preclude having applications on microfilm or microfiche.

(6) If the *mail-in application indicates that the applicant lives within the corporate limits of a municipality within the registrar's county,* the county registrar shall forward notice of registration, a duplicate copy of the application for registration, and any changes to such registration when they occur, either by certified mail to the clerk of the municipality indicated in the *application* or by personal delivery to such clerk, provided that a numbered receipt is signed by such clerk in return for the described documents. Upon receipt of the copy of the application for registration or changes to such registration, the clerk of *the* municipality shall register the applicant as a municipal elector and make a determination of the municipal voting precinct in which the person making the application shall be required to vote if a review of same indicates that the applicant meets all the criteria necessary to qualify as a municipal elector. The clerk shall send this municipal voting precinct information by United States first class mail, postage prepaid, to *the applicant* at the address provided on the application. Any and all mailing costs

incurred by the county registrar or the clerk of the municipality in effectuating this subsection shall be paid by the governing authority of such municipality. If a review of the copy of the application for registration or changes to such registration indicates that the applicant is not qualified to vote in *the* municipality, the clerk of *the* municipality shall deny such application and notify applicant.

(7) If the *application indicates that the applicant has registered to vote in another county or state,* the registrar or clerk shall send written notice of this new registration by regular United States mail to the registrar or clerk of the county stated *by the voter* as the voter's previous place of registration. The information shall include the complete name, address and age of the voter and shall include the Social Security number of such voter if it has been previously supplied. The election commission of the voter's previous place of registration shall be responsible for having such voter's name erased from the appropriate registration book and pollbook.

* * *

SECTION 21. Section 23-15-159, Mississippi Code of 1972, which requires that the names of persons who have not voted in at least one (1) election in the last four (4) successive years be erased from the registration books and pollbooks, is hereby repealed.

SECTION 22. The Attorney General of the State of Mississippi is hereby directed to submit this act, immediately upon approval by the Governor, or upon approval by the Legislature subsequent to a veto, to the Attorney General of the United States District Court for the District

of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

SECTION 23. This act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended.

[SEAL]

U.S. Department of Justice
Civil Rights Division

DLP:SBD:VNN:emr
DJ 166-012-3
94-4505

Voting Section
P.O. Box 66128
Washington D.C. 20035-6128

December 5, 1994

The Honorable Dick Molpus
Secretary of State
P. O. Box 136
Jackson, Mississippi 39205

Dear Secretary Molpus:

We understand that the State of Mississippi has begun implementing the National Voter Registration Act of 1993 (NVRA).

Our records fail to show that this change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.2, 51.12, and 51.13) (copy enclosed).

Should you elect to submit the specified change to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the procedural guidelines.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Mississippi plans to take concerning this matter. If you have any questions, you should call SaraBeth Donovan (202-514-1409) of our staff. Refer to File No. 94-4505 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/ John K Tanner

John K. Tanner
Acting Chief, Voting Section

(Civil Rights Division
Voting Section
94 Dec 19 AM 11:19)

STATE OF MISSISSIPPI
SECRETARY OF STATE

[SEAL]

POST OFFICE BOX 136
JACKSON, MISSISSIPPI 39205-0136
TELEPHONE (601) 359-1350
FAX (601) 354-6243

DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE
ELECTIONS AND GENERAL COUNSEL

December 14, 1994

Honorable Deval L. Patrick
Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
Post Office Box 66128
Washington DC 20035-6128
Re: File No. 94-4505

Dear Mr. Patrick:

Thank you for your concern about implementation of the National Voter Registration Act (NVRA) in Mississippi. My staff and I have been working with Ms Sara-Beth Donovan of your office regarding our plans for NVRA implementation. Our initial plans were to send the "pre-clearance" submission to you after passage of our proposed legislation. This was shared with Ms Donovan in late October.

Since that time, however, Ms Donovan contacted me to request materials which would explain the specifics of Mississippi's implementation plans prior to passage of the state legislation. This package was sent by Federal Express on Monday, December 5 to Ms Donovan's attention.

I trust the informational package will shed light on our implementation efforts. If additional information is needed, please let me know.

Sincerely,

/s/ C S Harvey
Constance Slaughter-Harvey

CSH:chj

(Civil Rights Division
Voting Section
94 Dec 29 AM 8:50)

STATE OF MISSISSIPPI
SECRETARY OF STATE

[SEAL]

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DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE
ELECTIONS AND GENERAL COUNSEL

December 20, 1994

Honorable Dave Hunter
Voting Section
Civil Rights Division
U.S. Department of Justice
Post Office Box 66128
Washington, D.C. 20035-6128

Dear Mr. Hunter:

This letter is in reference to your phone conversation today with Reese Partridge of my staff regarding Mississippi's implementation of the National Voter Registration Act (NVRA).

In accordance with your conversation with Mr. Partridge, please consider this letter as a request for preclearance under Section 5 of the Voting Rights Act of Mississippi's plan to administratively implement the provisions of NVRA, in accordance with the package of

materials which were submitted to your office on December 5 and December 14, 1994.

In particular, please regard the publication dated November 1994 and entitled "The National Voter Registration Act" as Mississippi's plan to administratively implement NVRA on January 1, 1995.

Please contact me if you have any questions.

Sincerely yours,

/s/ C S Harvey
Constance Slaughter-Harvey

STATE OF MISSISSIPPI
SECRETARY OF STATE

[SEAL]

POST OFFICE BOX 136
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DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE
ELECTIONS AND GENERAL COUNSEL

January 30, 1995

Honorable Dave Hunter
Civil Rights Division
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Dear Mr. Hunter:

Per your request, I am sending this letter to provide written clarification of the components of Mississippi's NVRA administrative program that we discussed during our telephone conversation today.

As your [sic] requested, the statement that "If the person is applying only on behalf of others, the opportunity to register need not be offered," *on page 1 of the NVRA Agency Manual,* will be struck from future copies of the manual. Agency personnel have been advised that their primary obligation regarding NVRA is to applicants for agency service. During ongoing training, agency personnel will be advised that this obligation would include persons applying on behalf of others. In any case, agency

personnel have been advised that a registration form should be given to non-applicants who ask for one.

You asked for clarification of the statement that "If the confirmation postcard is not returned AND the registrant fails to vote within two subsequent federal general elections, the registrant's name is purged," *on page 5 of the November 1994 NVRA Manual.* As you requested, this will be qualified in future copies of the manual. During training, it was made clear to election officials that current practice should be followed regarding registrants on the inactive list. That is, the registrant will be redesignated as active if he or she contacts the election official, properly requests an absentee ballot for an election that is conducted in the registrar's county, changes his or her voter registration to another location in the registrar's county, votes or appears to vote.

As you requested, *Page 6 of the November 1994 NVRA Manual,* regarding federally registered voters, will be modified. Election officials will be advised that the NVRA procedures should be followed with federally registered voters, but that the names must be sent to the Office of Personnel Management for final approval to purge.

You also asked for clarification of *requests for race information* on voter registration forms. Race is marked "optional" on the mail-in and agency registration forms to make it clear to applicants that failure to include race information will not disqualify their application. Race is not marked optional on the motor-voter because race information is required for a driver's license application.

I hope this information properly addresses your concerns. If additional information is needed, please let me know.

Sincerely,

/s/ Kate Margolis
Kate Margolis
NVRA Coordinator

STATE OF MISSISSIPPI
SECRETARY OF STATE

[SEAL]

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DICK MOLPUS
SECRETARY OF STATE

CONSTANCE SLAUGHTER-HARVEY
ASSISTANT SECRETARY OF STATE
ELECTIONS
AND GENERAL COUNSEL

MEMORANDUM

TO: Agency Representatives, National Voter Registration Act (NVRA)

FROM: Constance Slaughter-Harvey

DATE: February 24, 1995

RE: Status Report on NVRA

As all of you are aware, the National Voter Registration Act took effect January 1, 1995. Through your outstanding efforts on the NVRA Implementation Committee, Mississippi has implemented NVRA statewide, resulting in a significant number of newly registered voters. We estimate that approximately 4000 Mississippi citizens have registered to vote under NVRA during the first two months of 1995.

As many of you have heard, a problem has developed regarding NVRA voters being eligible to vote in state elections. NVRA is a federal law which specifically applies to the manner in which citizens register to vote in

federal elections. NVRA by itself cannot require that voters registered under NVRA also be eligible to vote in both state and federal elections.

Mississippi *state* law contains the procedures by which citizens register for state elections, such as the elections this year for state and county offices.

State legislation which would provide for a common voter registration system for both state and federal elections has apparently died in the Mississippi Legislature. The Legislature is still in session and will remain so through the end of March, therefore it is possible that the Legislature will still act on the NVRA legislation.

The current status of the law in Mississippi, however, is that voters who register under NVRA will be eligible to vote in federal elections only. This position has been enunciated by the Mississippi Attorney General's Office. We are confident, however, that this problem will eventually be corrected so that voters who register under NVRA and who have already registered under NVRA will be entitled to vote in both state and federal elections.

In the meantime, however, the Secretary of State's Office has several recommendations on how to deal with NVRA in your agency:

> First of all, it is imperative that your agencies continue to provide voter registration forms and process them just as they have since January 1, 1995. That is the single most important thing that your employees need to do.
>
> Your employees should be honest with clients about the current status of NVRA and may tell them that until the matter is resolved, the NVRA

forms only entitle them to register to vote in federal elections, but they *should not discourage potential voters from registering*. Any client with a question about voter registration should be provided the Secretary of State's Hotline number: 1-800-829-6786.

At your discretion, you may also consider having employees do one of the following:

Advise clients who wish to vote in both state and federal elections they will need to complete the state "long" mail-in voter registration form, which are available from their circuit clerk or from the Secretary of State's Office; or,

Provide clients the state "long" mail-in voter registration form along with the "short" NVRA form you are already providing. Bulk quantities of the "long" form are available from the Secretary of State's Office. You may forward the completed "long" forms to the local circuit clerk along with the NVRA forms.

Circuit clerks have already been advised to contact all voters registered under NVRA and provide them with the state "long" mail-in voter registration forms. In addition, Circuit Clerks have been advised that if they do not wish to contact those NVRA voters, the Secretary of State will do so for them.

As this matter evolves, we will keep you informed. If you have any questions, you may contact Kate Margolis, our NVRA Coordinator.

STATE OF MISSISSIPPI

(Seal)

OFFICE OF THE ATTORNEY GENERAL

MIKE MOORE
ATTORNEY GENERAL

OPINION
DIVISION

March 9, 1995

The Honorable Elizabeth Johnson
Acting Chief, Voting Section
Post Office Box 66128
Washington, D.C. 20035-6128

Re: File No. 95-0418

Dear Ms. Johnson:

We are in receipt of your letter dated February 16, 1995, in which you state that you were advised by the Mississippi Secretary of State's Office that the State of Mississippi was instituting a dual registration and voter purge system within the State of Mississippi.

We conferred with the members of the Secretary of State's office and they told us that they did not advise the Department of Justice that the state had instituted a dual registration system. We are aware that the Mississippi Secretary of State's Office submitted for preclearance pursuant to Section 5 of the Voting Rights Act an administrative packet on voting procedures that would be implemented within the state pending the passage of state legislation mirroring the NVRA. The Secretary of State's Office advised us that this was done at the request of your office. This is a bit surprising as C.F.R. §51.22 states that the Attorney General will not consider on the

merits a proposal for change affecting voting that is submitted prior to the final enactment or administrative decision, or a proposed change which has a direct bearing on another change affecting voting that has not received section 5 preclearance. Any submission of changes to the voting registration or purging procedures would be premature unless the requisite state legislation had been passed.

Moreover, we are also confused as to what the Attorney General is seeking from the State and this office. The State of Mississippi has not initiated, nor implemented any change affecting voting within the State, other than our implementation of NVRA. All voter registration and purging procedures and laws being utilized within the State have been submitted and precleared by the Department of Justice. The changes affecting voter registration most recently implemented by the State are those mandated by NVRA, not any change initiated or instituted by the State itself. Therefore, we remain at a loss for what the Department of Justice would have this office submit under section 5 for preclearance.

If this office can be of any further assistance to you, please let us know.

Very truly yours,

/s/ S M Shelson
Sandra Murphy Shelson
Special Assistant Attorney General

cc: The Honorable Constance Slaughter-Harvey
Assistant Secretary of State

STATE OF MISSISSIPPI

(Seal)

OFFICE OF THE ATTORNEY GENERAL

MIKE MOORE
ATTORNEY GENERAL

FAX TRANSMITTAL
Mississippi Attorney General's Office
EXECUTIVE OFFICE FAX: (601) 359-3441
ALL OTHER FAXING: (601) 359-3796

TOTAL NUMBER OF PAGES
(INCLUDING THIS COVER PAGE) 5

DATE 5-25 TIME 11:20

Please deliver to:

NAME: Chris Herren
FAX NUMBER: 202-307-3961
FROM: Sandra Shelson

For problems receiving documents, contact
Debbie Morgan at (601) 359-3688

Message from Attorney General, Mike Moore and your Circuit Clerk, _____.

_____ County

ATTENTION REGISTERED VOTERS

Did you register to vote at your local Department of Health, Welfare Office, Rehabilitation Services Office, Medicaid Office or when you applied for or renewed your drivers' license? If you did, you *only* registered to vote in federal elections. We want you to be able to vote

in state and local elections, such as those for Governor, Supervisor, Sheriff, or Mayor. Please either go by the Circuit Clerk's Office in your County or to your City Hall to receive help in registering. In order to vote in the August Primaries, you must register by July 8, 1995.

EXERCISE YOUR RIGHT TO VOTE!

Please adapt this Public Service Announcement for your own use.

Suggested form letter to be sent to those registered to vote under NVRA. Please adapt this letter for your own use.

Dear Mr./Ms. _____:

This is to notify you that you have registered to vote under the National Voter Registration Act. You are registered to vote in federal elections ONLY. We would like for you to be eligible to vote in ***ALL*** elections; for example, for mayor, sheriff, or governor, you will need to complete the enclosed state mail-in voter registration form and return to this office. Remember, you will only be able to vote in federal elections unless you complete this additional form. Be sure to have your form witnessed by a registered voter in your county. If you want to vote in the local and state-wide elections this year, please complete this form right away and mail it in. **The registration deadline to be eligible to vote in the August Primaries is July 8, 1995.** Please return this form immediately. Upon receipt of your completed form, we will send you an additional notice.

Your precinct for voting in federal elections is _____.

Sincerely,

_____

Circuit Clerk

Suggested Procedures for Contacting Persons Registered Under NVRA Only

1. Fill out a state mail-in registration form for each NVRA registrant.
2. Send the filled out form to every registrant when you send notice of NVRA registration.
3. Follow up with a telephone call to each registrant.
4. When notice is sent of registration pursuant to NVRA, stamp registration card in red ink "FEDERAL ELECTIONS ONLY."
5. When possible, pay registrant personal visit with state mail-in form in hand. Remember that the state form must be witnessed. The witness must be registered to vote in the county of the applicant. (Be sure to have someone with you to witness the form if you are a candidate for re-election).

_____

[p. 10] Ms. Simmons, can you tell us, as of today or as of some day recently, how many persons have registered in Bolivar County through NVRA procedures?

A The last count I had which was sometime last – I think sometime last – we had 177. Maybe I had a few others in the office but those were the ones that I was working on and trying to get into the computer and the notices on.

Q Okay. And as of today, how many of those 177 people will be able to vote in the election coming up in August?

A None.

[p. 11] Q Did you say none?

A Right.

Q Okay.

MS. WILLIAMS: Chris?

BY MR. HERREN:

Q And why is that there are – that none of those people will be able to vote in the August election?

A My understanding is they are not able to vote because the NVRA form only permits persons to vote in a federal election.

Q And how did you come by that understanding?

A I suppose it was at a circuit clerk seminar.

Q And when would this seminar have been?

A It was in February, I don't remember the date.

Q And where was this seminar?

A It was in Jackson, Mississippi.

Q And was this conducted by the Secretary of State?

A No, it's our annual seminar and we have [p. 12] various – we have people there from various agencies.

Q And at that seminar do you remember who told you –

A I don't remember specifically who was there on the podium at the time this was discussed. I don't remember that.

Q Okay. Just to be clear, this would be in February of this year?

A February 1995.

Q Thank you. For these persons who have registered, these 177 persons, what sort of steps are you taking, if any, to notify them that they can't vote in state elections and they need to register again?

A They were sent a letter – I think I'm going to strike that and start over.

There is a letter informing them that they are only eligible to vote in the federal elections. Attached to that letter is a state mail-in registration form and a voter registration card that has, written in red, "federal elections only."

[p. 13] Q And when did you send those letters out?

A We finished that batch yesterday and they were mailed this morning.

Q So this was the first batch?

A Yes.

Q And did it go to all 177 people? I'm sorry. Ms. Simmons, did you hear my question? Did that –

A Did the letter go to all 177? I understand it, his question is did the letter go to all 177, and my answer is –

Q I'm sorry. We couldn't hear your answer, Ms. Simmons.

A My answer to the question is yes.

Q Thank you. I am sorry about the connection.

Now, this letter that you sent out, was this something that you drafted or was it something that was drafted by a state official?

A It was drafted by a state official.

Q And do you know – where did you get this letter from?

[p. 14] A I believe it came from the Attorney General's office. I'm not sure.

Q Okay. And was the Attorney General the one who suggested that you send out this letter and the state form and the voter registration card marked federal elections only?

A I don't – I don't remember that the letter said that specifically. I read the sense of the letter and I thought it was satisfactory to do that as we had in February, and the way that we do that is to send out the state mail-in forms. So I did that and I sent it out. But I didn't –

Q We lost the last sentence. We couldn't hear the last sentence.

A What does she have? I said that I sent a voter registration card but I do not remember if there were instructions attached.

* * *

[p. 16] Q I wanted to talk just for a second about some of the other things that you might be doing to get these 177 people registered for the state elections. When you sent out the state mail-in form in this mailing, did you have time to actually fill out the form?

A No, I did not. I don't have the staff for that.

Q I believe you said you don't have the staff for that?

A Right.

Q Now, this mailing that you sent out, did your office pay for that or did the state pay for it?

A My office paid for it.

Q Have you done any advertising in the [p. 17] newspaper or on radio or TV about the situation of these NVRA registrants not being able to vote in the August election?

A I have gone to our local newspaper.

Q Yes, ma'am?

A There was a sample public notice that came with the sample letter and I took the sample notice to the paper and that notice is going to run two days per week for four weeks.

Q Have you had the opportunity to call any of these 177 people to try to get them to send the state mail-in form in or tell them that they need to register using a state form?

A No.

* * *

[p. 18] Q Prior to this seminar in Jackson back in February that you discussed, do you have any idea how many people had registered in Bolivar County under the NVRA procedures at that time?

A I don't know, I think before I went I got in a few pieces from – I don't even know where they came from but at that particular time, I was not aware that all this –

Q I'm sorry. You were not aware of what?

A I was not aware that these –

Q I'm sorry. You were not aware?

A I was not aware that those people registered on the NVRA form would not be eligible to vote in all elections.

Q Okay. Just because it broke up a little bit up here, I believe you said that you were not aware at that time that the persons who registered using the NVRA forms would not be eligible to vote in all elections; is that correct?

A Right.

[p. 19] Q Now, as far as these things that you are doing to go out and catch up with these people who've

registered under the NVRA, are these things you've ever had to do before, or is this something new?

A This is something new.

Q Okay. Now, early in the year, back in January perhaps, did you get some of the new NVRA mail-in forms from the Secretary of State's office?

A Yes.

Q And did you use those at all in registering people?

A I gave forms to a person but I did not use it.

Q And why was it that you didn't use them?

A It could have been because nobody was registering. If they were, I used my regular forms. I mean, register for the fall election.

Q Now, you said you gave out some of these NVRA mail-in forms to one person?

A Yes.

Q Was that somebody who was doing a voter registration drive or something?

[p. 20] A Right. They had read something in the paper about the mail-in registration and they called me about the forms.

Q And then they came by and got some?

A Yes.

Q Do you have any idea how many?

A Probably about 15 or something like that.

Q Now, right now, if somebody comes in your office and they want a mail-in registration form, which form do you give them, the state form or the NVRA form?

A The state form.

Q And why do you give them the state form?

A I give them the state form so they can vote in all the elections.

Q So you've stopped giving out the NVRA mail-in forms?

I'm sorry, we couldn't hear you.

A I was asking did I do what?

Q Did you – have you pretty much stopped now giving out the NVRA mail-in registration forms?

A I only gave the form out that one time.

* * *

* * *

[p. 8] Q Okay. I wanted to ask you at the outset if you have a figure, a recent figure for the total number of people that have registered in the – in your county through NVRA procedures, either through the mail-in or the agencies, the driver's license, that sort of thing. Do you have a current figure for that?

A I do. It's on my desk. Can you hold just a minute?

Q Yes, ma'am.

A At this point we have received approximately 634 applications on the National Voter Registration Act.

* * *

[p. 9] Q Okay. So as of today, for those 634 NVRA registrants in your county, do you know how many of [p. 10] those people will be able to vote come August?

A Approximately 40.

Q Now, those people, those 40 people have also registered separately for state elections; is that correct?

A That's correct.

Q Okay.

A That is why they are going to be able to vote.

Q One of the things that I wanted to ask you a little about was the sort of things that you are doing there in Lee County – and by "you," – I mean the circuit clerk's office – to get these 634 NVRA registrants registered for state elections. Have you been mailing out state mail-in forms to these people?

A We have.

Q And when did you-all start doing that?

A When did we start sending mail-ins to them?

Q Yes, ma'am.

A I believe it was – I'm not real sure about the date but the first state mail-in forms were sent [p. 11] approximately around the middle of February, I believe.

Q Okay. Now, do you-all have the opportunity to fill out those forms in advance when you send them to people or are you just sending them blank forms?

A We are sending them blank forms.

Q Do you send any kind of explanatory letter with that?

A We do.

Q And what does that letter basically say?

A It basically says at this point that they are registered for federal elections only. If they would please fill out the enclosed state form – I don't think it says state. It says mail-in voter registration application and send it back to us, you will be registered for state and local elections as well, and we will send you a voter registration card.

Q Now, those 40 people who will be able to vote, the 40 of those 634 who will be able to vote in the state elections this year, have those been people who sent back those state forms?

A Yes.

[p. 12] Q Okay. Have you sent these forms out and these letters out in batches or did you send them out all at once?

A Well, you know, as we had time, I sent them out. It might have been a few together and then I may have gotten one through the mail and I may have sent out one at a time. You know, they were sent out as they came in.

Q And are these – when you are doing these mailings, do you include a postage prepaid return envelope or something?

A No.

Q Now, these mailings that you are doing, are those expenses being absorbed by Ms. Gwin's office?

A Yes.

Q So the state is not reimbursing you for those mailings?

A Not that I know of.

Q Okay. Now, you mentioned the voter registration card. Have any of these people who have registered under the NVRA been sent a voter registration card thus far?

[p. 13] A Thus far? Well, I will just have to back up just a little bit –

Q Okay.

A – and tell you what happened at the beginning.

Q Okay.

A When we first received our first – what do you call those things – National Voter Registration Act forms, from the driver's license bureau –

Q Yes, ma'am.

A – we had never gotten any before. Well, of course they were different, and we didn't know – we did not know what to do with them. So we did call the Secretary of State's office and ask what we were supposed to do with these forms. And we were told that we were supposed to register the people to vote just like a normal application.

So we did this. I think it was the first 275 we did that way, and they were sent a voter registration card. Then Mrs. Gwin attended a seminar in the middle of February in Jackson, and we were informed that these people were in fact only [p. 14] registered for federal elections. But at that point, these 275 people had to be notified that they were registered for federal elections only. And the Secretary of State's office did do this for us. I sent them a list of the people's names and addresses and they did notify the people that they were registered for federal elections only.

Since that time, no other people have been sent voter registration cards, they have only been sent the letter and the state mail-in form.

Q Okay. Ms. Horton, were you finished?

A I'm finished.

Q I wanted to ask you just a bit about other things that you might be doing to catch up with these 634 folks and get them registered for state elections. Have you

done any kind of advertising about the fact that these folks will have to register separately for state elections?

A We have not done any advertising ourselves but, of course, our papers have been full of what they call the, quote, "motor voter deal" and people in this area are very, you know, are very familiar [p. 15] with this and so forth because it has been in all the papers but our office has not advertised.

* * *

[p. 17] Q Have you in the past in your time in the circuit clerk's office had to send out letters with state mail-in forms, for example, telling people they were only registered for certain elections?

A No.

Q Okay. So this is something new that you are doing?

A Yes.

* * *

[p. 20] Q And in terms of the federal forms, the NVRA forms that you are getting in now, are you keeping those folks on a separate list or how are you handling those registrations?

A I'm keeping them on a separate list. We have a – just, you know, just a completely separate list. The people are placed in precincts and the names are put under which precincts that they are in, and just keeping a complete separate list of the ones that's registered for federal elections only.

* * *

[p. 28] BY MR. MANUAL:

Q Of those – you'd mentioned that you had registered 275 voters from January to February, I mean January until you were notified that they were – the forms you were using didn't register for both state and federal elections?

A Uh-huh.

Q Did you place those voters on a single roll, on whatever the voter registration roll you-all had at the time?

[p. 29] A Did I put them on our regular voter registrations?

Q Yes, ma'am.

A We did.

Q So when you found out that they were not registered for both elections, what did you do? Did you take those names off of the roll?

A We deleted them.

* * *

CAROL HORTON

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[p. 8] Q Okay. The first question I had for you was do you have a figure, a relatively current figure for the number of people that have registered in Hinds County through the NVRA procedures?

A About 2086.

Q Okay. And is it your understanding that unless those people registered separately for state elections, they won't be able to vote in the state elections this year?

A Yes.

Q Do you have any idea about how many of those 2086 NVRA registrants have separately registered for state elections?

A 300, more or less.

* * *

[p. 9] Q Okay. And when is the registration cut off?

A July the 8th.

Q Okay. I wanted to talk to you a little bit about what sort of things that you are doing to get these 2086 people registered for state elections.

Are you sending out state mail-in forms to these folks?

A Yes, we are.

Q And when did you start doing that, approximately?

A Oh, sometime in February, if I'm not mistaken.

Q Okay. Now, are you – are you just sending out blank forms or do you have time to fill those out?

A No, we are sending blank forms only.

[p. 10] Q Okay. And are you sending a letter along with that?

A Yes, I am.

Q And what does that letter basically say?

A That we have received their NVRA form and that we are enclosing a Mississippi mail-in voter application so that they will be able to vote in state, county and city elections if they fill it out and get it back to us in time.

Q Now, those 300 or so people who have separately registered of those 2086, are those folks who sent that state mail form back?

A Yes.

Q Okay. What other sorts of things are you doing to try to get those 2086 NVRA registrants registered for state elections this year?

A Oh, basically that's all, except sending some of the forms to the agencies.

Q Now, when you say send forms to the agencies, you mean the state mail-in forms?

A Yes.

* * *

[p. 12] Q Okay. Now, the things that you were talking about, sending out these state mail forms with the

cover letter, trying to get these state [p. 13] agencies in your county to have the state mail forms available, are these new things that you've – you're doing this year that you haven't done before?

A Yes.

Q Okay. And are these things that the state Secretary of State or Attorney General has suggested to you would be good things to do?

A Yes.

* * *

[p. 14] Q Okay. What about voter registration cards for these folks, are you sending out a voter registration card to these NVRA registrants?

A Yes, we are, with "federal voter only" stamped right above it.

Q Okay. So you are sending them out as soon as you get the NVRA registrations in?

A As soon as we put them into the computer, yes.

Q Okay. Now, your NVRA – now, for these NVRA registrants, right now are they being kept on a separate list?

A No, they are put in my computer, but we've coded these different agencies –

Q Uh-huh.

A – with a numerical code so that we can tell you, you know, what – code 1, 2, 3, 4, 5, 6 I believe is what we've got into the computer and anything else is either regular or mail in.

Q Okay. So you know, though, that those persons are registered only for federal elections?

A Yes.

* * *

[p. 15] Q Right now – right now in your office, if somebody walks in and they want to register to vote in your office, what form do you use to register them?

A A regular Mississippi form.

Q Is that the three-part form?

A It is.

Q Okay. And does that form have any requirement that it be witnessed by somebody in your office?

A Yes. We sign it.

Q Okay. What about today, if somebody walks into your office and they want to get a mail-in form, do you give them the state form or the federal NVRA form?

A Give them the state form.

Q And why is that?

A I just do.

* * *

[p. 17] Q Okay. But as far as you know now, you-all aren't giving out any of the NVRA mail-in forms?

A No, we are not.

* * *

[p. 19] Q Okay. And have you – have you gotten any memos or anything from the Secretary of State's office with ideas about things to do in this situation?

A I think so. It basically is – yes, I have gotten a letter from the Secretary of State.

Q And do you know when that was sent?

A No, there is not a date on this letter, no.

[p. 20] Q Okay. And what does the letter basically say?

A It just tells us to make sure that, you know, to tell people to make sure that they are registered in this year's state and local elections, you know, to send them the form and ask them to fill it out, to have it witnessed by a registered voter in the county in which they are trying to register to vote in and mail the form back to the circuit clerk in a pre-addressed – and they have postage-paid envelopes. Of course, we in Hinds County have not put postage on the envelope – or, you know, tell them that if they wish they can come to the circuit clerk's office and register in the person.

* * *

[p. 26] Q But in terms of that, sometime around, then, after you found out that the NVRA forms were just going to register people for federal elections, is that when you started out sending out these letters –

A Yes.

Q – in the state mail forms –

A Yes.

Q – and trying to get the agencies to have state forms in them?

A Yes.

Q Is that when you started sending out the voter registration cards that were stamped "federal voter only"?

A I had to order a stamp for that.

* * *

* * *

[p. 9] Q Okay. As of now, as of today, is it your understanding that the people who have registered through these NVRA procedures in your county will not be eligible to vote in the state elections this year unless they separately registered for those state elections?

A That's my understanding.

Q And how did you come by that understanding? Where did you find that out?

A In February we were at a circuit clerks seminar and we found out that the proposed state legislation did not pass, and we were advised at that time that the people that registered under NVRA would only be eligible to vote in federal elections. I don't know the exact date. It was the latter part of February.

Q Okay. Have you been sending out any state mail-in registration forms to these people who have [p. 10] registered under the NVRA in your county?

A Oh, yes, sir.

Q Do you have any sense of how many of those forms you've gotten back from people?

A No, I don't. I know that when we ran the statistics a couple of weeks ago there was still a good number, but I just don't remember what the number was and I would not want to take a stab at it without having accurate information in front of me. Since then we have had four people on the telephone following up, telephoning these people and they are starting to come back in, so we are getting a good response at this time.

Q Do you remember approximately when you started sending out these state mail-in forms?

A Yes, sir. As soon as I came home from that meeting – we were in a term of court. I left to go to Jackson during a court term and as soon as we got out of that term of court, which would have been – I think it ran through the first week in March. Right after that term, it would have been around the second week in March, I wrote a letter and started sending [p. 11] the mail-in forms out to everyone that I had received an NVRA form from.

Q Now, sending the state forms out to these NVRA registrants, was that something that was discussed at that meeting? What that something that was suggested as being a good idea to do at that meeting?

A I really don't recall. I honestly don't recall. It has been so many things that have happened and so much time that has passed, I really – I really do not honestly remember if that's a call that I made myself or whether it was suggested.

Q When you send these forms out to people in your county, are you – do you have the chance to fill those out beforehand or are you just sending out blank forms?

A We fill out as much information as we can. The state form, I believe, asks a few questions that the federal form does not, or in a different manner perhaps, and we fill out as much of the information as we have on the form and we send them a [p. 12] self-addressed, stamped envelope for them to return it in, and, you know, we advise them in a letter to please complete it and sign it

and have the signature witnessed and return it so that they will be able to vote in all elections.

Q And is your office bearing the cost of sending out these forms to people?

A The county is. It is coming out of the election budget.

Q Now, do you sort of get a group of these NVRA registrants together as they come in and send them out as a group or do you just send them out as they come in day by day?

A Daily.

Q Daily?

A Daily. We are staying up with them.

Q And you mentioned that the people in your office were following up with phone calls; is that right?

A Yes, sir.

Q And when did you start doing that?

A Within the last week.

[p. 13] Q Okay. And what prompted you to do that? Was that something the state suggested or what prompted that?

A No, I just wanted to do it because I felt like there were a good number of them out there that had not come back and I just wanted to get as many of them in as I could. The response that we're getting from most people when we call them is oh, yes, I know I got that. I've got to do that. Thank you for reminding me. I'll get it back in

the mail to you. So I think that we are going to get a good response from the effort.

Q So you think making the calls has helped?

A I do.

Q Have you had a chance to take out any public service announcements or put anything in the newspaper about it?

A Yes, I released a statement to the media about a week ago – I don't know that it's run yet. I sent it to all of the radio stations. I don't have that in front of me. I moved my election folder to the other office where I was working on ballot [p. 14] types – giving them the general information about the deadline to register to vote and the extended hours that we will be open the week of July the 4th and Saturday, July the 8th. I also said in that – I addressed the issue that if they had received a state mail-in form and had not completed it and returned to this office, they needed to do that also by July the 8th. They need to be postmarked by then. It went out to all of the local media and radio stations.

Q Okay. Now, the July 8th, that's the deadline for registering for the August primary; is that right?

A That's correct.

Q And so any of these folks that don't get the state mail forms back to you by that time won't be able to vote in the August primary?

A That's correct.

Q Okay. What have you done about sending a voter registration card to these NVRA registrants? Have you sent one at all or what have you done?

A I'm thinking. At this time when I receive a federal NVRA form we are sending them a letter. [p. 15] I'm not sending them a registration card. I'm sending them a letter notifying them that they are registered to vote in federal elections, and naming their precinct letter. And in that letter I also tell them that I would like for them to be eligible to vote in all elections, for example, for mayor, supervisor, sheriff, et cetera, and it will be necessary for you to fill out a mail-in form and return it, and I give them all the deadline dates and so forth and so on, enclose the form and a self-addressed envelope with it. So they are not getting a card right now. It's all in that note, the notification letter.

Q When you say that the NVRA registrants aren't getting a card right now, had you done so at some time in the past?

A Between January the 1st and when I was made aware that the legislation didn't pass in February, they received a card.

Q And would that have been the normal card that you sent in the past?

A Yes.

* * *

[p. 21] Q Okay. If somebody comes in and wants a mail-in form today do you give them the state form, the state mail-in form or the NVRA mail-in form?

A I first ask them would they like to be eligible to vote in federal elections only or all elections. If they tell me federal only, I have them the federal mail-in form. If they tell me they'd like to be eligible to vote in all elections, I give them the state mail-in forms.

Q And has anybody said that they wanted to be registered for federal only?

A No sir.

Q And when did you start asking that question that you recall?

A After I was made aware in February at that meeting that the state legislation had not passed.

* * *

[p. 25] BY MR. HERREN:

Q Ms. Salazar, when you talked to someone from our office earlier, a week or so ago, I believe you'd indicated that there were 451 people registered under the NVRA as of May 30th. Does that sound about right?

A It does, Uh-huh. Now, you say it was just a week ago? I was thinking it was more like two [p. 26] weeks ago. I don't remember the date. I talked to your office twice recently –

Q Okay.

A – and I don't remember the date that that conversation took place.

Q I don't have it in front of me either.

A That sounds pretty close.

Q And of those 551 people –

A No, you said 451.

Q I'm sorry. I apologize. Of those 451 people, I think you told us before that 148 of them had returned the state mail-in forms, does that sound about right, before you started making the calls?

A A hundred and what?

Q 148.

A That does sound – that sounds about – I recall close to that. I don't know if that is the exact number but yes, that sounds about like what we said that day.

* * *

[p. 8] Q Okay. The first question I have for you is, basically, do you know as of today, or as of some recent date, how many people have registered through NVRA procedures in the state of Mississippi?

A We have received approximately 600 forms.

MR. SANDERS: I think you said in the state of Mississippi.

THE WITNESS: I'm speaking strictly Forrest County.

BY MR. HERREN:

Q I apologize. About 600 forms in Forrest County?

A That's right.

Q Do you know about how many of those persons have also registered for state election separately?

A We have had approximately 125 to 150 that [p. 9] have responded and have registered on the Mississippi forms.

Q Now, for the remaining 400-something folks who have registered through the NVRA procedures, is it your understanding that they will not be eligible to vote in the elections coming up in Mississippi this year unless they separately register through the Mississippi forms?

A Yes.

Q So what sort of things are you doing these days to try to track down these 600 or so people and get them registered for state elections?

A Immediately upon receiving these from the various state departments, we are mailing out a Mississippi

registration mail-in form, a letter from me bearing my name with an explanation of what the situation is, telling them they only registered for federal elections, and a self-addressed stamped envelope is placed within an envelope and mailed to each one of them, to the address that is on the form from the state agency.

Q Have you-all had the opportunity to fill [p. 10] out the forms at all before you send them out, or are they just blank when they go out?

A They are blank.

Q And the forms that you are sending out to them, those are the state mail-in forms that you-all started using back in 1992?

A I believe so, yes.

Q Those are the one with the witness requirement?

A Right.

Q And when did you-all start mailing out those forms to people, those state forms to these NVRA registrants?

A Well, actually, to begin with, we were not really aware that they were a federal election – federal registered voters only. So we had to back up in mid-February and every one that we have received since January 1 of '95 has been mailed with the Mississippi form with the letter in the envelope.

Q So it was about mid-February when you started sending these letters out?

A We went back to all those that we received [p. 11] during January and mailed it to them, too.

Q So about how many people had registered before that, before mid-February?

A Oh, I don't have that figure. Probably in the neighborhood of 100, 125. That's a guesstimate.

Q Now, are you mailing out voter registration cards to the people who registered under the NVRA?

A No, we are not. We will mail them federal registration cards only. At this point, I don't think we have mailed any of those out. Since we have no federal election this year, we have not done that so far.

Q Have you had the opportunity to do any advertising about this situation that these NVRA registrants will have to register again for state elections?

A Yes. It has been provided to all the news media here in Forrest County and we have had some coverage on it, on some of them.

Q Did you give out a press release or anything?

A Yes, to newspapers, to TV stations and all [p. 12] the radio stations.

Q Was this a press release that you drafted?

A Well, it was one that was drafted jointly. It was between the Attorney General's office and ours.

Q Now, the letters that you are sending out to people with these forms, are these letters that you came up with? Or were they, again, jointly drafted?

A No. It was one that I had already drawn up.

Q What basically does the letter say?

A What does what? I'm sorry. What?

Q What basically does the letter say that you are sending out to these NVRA registrants?

A It is just calling attention to the motor voter registration and if you filled out a registration form at the following places, naming the state agencies, and advising them that they are only registered for federal elections. If they wish to vote in other general elections, we encourage them to fill out the Mississippi form and return it to us [p. 13] immediately.

Q And is it your understanding in order to be eligible to vote in the August primary, that folks would have to get those state forms back to you by July 8th?

A Yes.

Q Have you had the opportunity to do any kind of follow-up calls to these people that you have sent the letters to?

A We have begun to try that, and we can reach very few of them. Most of them don't have telephone numbers on them, and many of them do not have – we can't get any answer or response at those numbers. But we have had a few calls made. We have not had, to my knowledge, any response to the telephone calls.

Q Have you had the opportunity to talk to any of the state agencies there in your county about whether they should offer state mail-in forms in addition to the federal forms that are already offered?

A Yes. I don't know what offices have them.

* * *

[p. 15] Q Now, the things that we were talking about, such as your mailing out these forms, mailing out these letters telling people they needed to separately register for state elections, are these new things that you are having to do since February?

A Yes.

Q That was a yes?

A Yes.

Q Now, going back just a bit. You had said, I believe, that you found out about mid-February – I'm sorry. Strike that.

About mid-February you started mailing out the Letters; is that right?

A Yes, uh-huh, along with the Mississippi forms.

Q And I believe you said that you weren't [p. 16] aware prior to that time that people were being registered for federal elections only?

A That's right.

Q How did you find that out, that they were only going to be registered for federal elections only on the NVRA forms?

A Well, actually, we were at a seminar in Jackson around the 13th or 14th and the Attorney General's office, I think it was, advised us at that time that that covered only federal elections.

Q Do you remember who it was that advised you of that?

A No, I don't.

Q Did they give you anything in writing that indicated what the proper procedures would be for handling these forms?

A I don't recall at that time receiving anything. I think we have had correspondence since then from the Attorney General's office with suggested ways to handle it, which is what we were already doing.

Q I believe you indicated that prior to that [p. 17] meeting, you thought that there were somewhere in the neighborhood of 100 to 125 people?

A That may be an exaggerated number. I really don't – I should just clarify that by saying I really don't know how many we had received up to that point.

Q But you believe that there were at least some?

A Yes, uh-huh.

Q And prior to that time, had you put those people on the main registration list?

A Yes, we had.

Q And had you sent them the regular voter registration cards that you send to people who registered using the old state forms?

A Yes.

Q And after February, after you went to this meeting in Jackson, did you have to go back and take those people off?

A I believe they were all flagged in the computer as federal registered voters.

Q So you had to go back and flag them in the [p. 18] computer?

A Yes.

Q That meant they could only vote for federal elections?

A That's right.

Q So prior to February you had thought they were just like all the other registered voters that registered using the state forms?

A That's correct.

Q Now, today, if somebody comes into your office to register to vote, what form do you give them to register?

A We have a different form that we use in the office where they fill it out and I or a deputy clerk acknowledges – we determine their precinct and give them their registration card at that time.

Q Now, is that the triplicate form, the three-part state form?

A Yes.

Q And that registers people for all elections?

A All elections. A copy is sent to the two [p. 19] cities in Forrest County if they live in the city, and would go in the city book.

Q If somebody comes into your office today and wants a mail-in registration form, what form do you give them?

A Well, if it was one that they wanted to take to their wife – a lot of times a spouse will register and they will let them have that mail-in registration form to take back to their spouse to mail back to us.

Q Is that the long state form, the old form?

A Yes, it is.

Q Now, back in January had you gotten any of the short sort of NVRA mail-in registration forms from the Secretary of State's office?

A I believe we had received some with instructions to just do away with the previous form we had been using, and fortunately we did not, and then we were corrected and told that we would use the long form again and mail in, which required a 30-day cutoff period.

Q Had anybody registered using those NVRA [p. 20] mail-in forms back in January?

A They probably had. It would have been a bit of a disadvantage. My registration office is in another building, but yes, I'm sure we must have gotten some of them.

Q But after you found out that those NVRA forms just registered people for federal elections, did you pretty much stop using those forms?

A Yes, uh-huh. Yes, we did.

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[p. 7] Q The first question I had was as of now, do you know how many people have registered through the NVRA procedures in Warren County?

A Approximately 300, 2- to 300. No, I haven't got an exact figure.

Q Are you aware of what elections those persons are eligible to vote in?

A Just the federal election.

[p. 8] Q Do you know how many of those 300 or so people have separately registered to vote in state elections?

A About 25.

Q Is the office that you work in doing anything to try to catch up with those 300 or so NVRA registrants to try to get them registered for state elections?

A Yes. Yes, we have.

Q What sort of things are you doing?

A Well, first of all, the first group when we found out we had a problem with them not being able to vote in Warren, in the state election, we contacted the Attorney General's office – Secretary of State's office and they informed us to mail them all out applications that we have received, and we were notified then by mail.

Then we got another letter informing us that we could stop mailing them out, so we began to mail out applications, mail-in applications for them so they can

register here for the state election, county and state election.

[p. 9] Q Okay. Now, when you say you found out there was a problem, about when was that?

A Right after the first of the year, I think we read in the paper or got a notification from the state – I think I read in the paper – I can't remember how I knew about it first – that the ones we were receiving, those applications for federal forms, they would not be eligible to vote in the state election and county election.

Q Just so I make sure we understand, the first group of those folks, you say you sent off the list of those NVRA registrants to the Secretary of State's office?

A We sent them a copy of those applications.

Q And then it was your understanding that the Secretary of State's office would notify those folks?

A Right.

Q And then the Secretary of State's office would send them a state mail form; is that your understanding?

A That's the way I understood they did.

Q And when about would that have been?

[p. 10] A I think I talked in – about February, I believe, because we were trying to see what we could set up on the computer, how we can, you know, be able to put them on our computer so they can be, you know, on the voter rolls like everybody and it just showed that it was a federal register.

Q When you say you were trying to put them on the computer, what do you mean?

A I had been talking to our computer people, and we was trying to figure but how we were going to be able to serve them, like our computer registration forms or whatever, everybody that is a registered voter is on our computer.

So we were trying to see how they could do a program to offset them so we could pull them up and they would not be on the main register with the people who registered by our state application.

That's when I was talking about the Secretary of State's office, about that, and they told me that it was just – to run a copy of those and mail that to them and they would notify the people here.

[p. 11] Q Do you have any idea about how many people that you sent up to the Secretary of State's office for them to notify?

A No. I would just have to guess. One of the other girls did that. I did not do that. The only thing I can do is guess, somewhere about 200.

Q And when did you find out – I believe you said that there was another letter that indicated that you-all in Warren County could send out these letters notifying people that they could only vote for federal elections. When did you-all find that out?

A I don't have that date on the letter. I don't know. Shelly is the one who got the letter from them, and she opened the mail and received it. So I really don't know

when she did. I would guess about March, but I'm not really sure.

Q Okay.

A She began to mail out the applications then. It is not applications. It was a letter informing them that they had to come to our office to register to vote for the state and county election or [p. 12] contact us or either use the mail-in, if we mailed them out to them.

Q So, today, when you get these NVRA registrations in, do you-all mail them a state form today?

A In the past we mailed them either a letter stating what they can do or the form.

Q So that's what you-all have been doing? You either mail them a letter –

A We mail them a letter regardless. And sometimes – the letter from the Secretary of State's office said we didn't have to mail the form, but we could request one. At first we started mailing the letter and the form and the responses were slow. We stopped mailing the form. We just mailed them a letter notifying them what the situation was.

Q So the response was very slow?

A Yes.

Q So that's when you stopped mailing out the state mail-in form to those people?

A Right.

Q Now you send them a letter sort of [p. 13] explaining the situation?

A Right.

Q Have you-all had the opportunity to put any kind of public service announcements out about this situation or do any kind of advertising?

A From my office, no. But there has been a write-up in the paper through the news media explaining everything, if you have questions, ask questions of the circuit clerk about that, just through an article in the paper.

Q Okay. What about voter registration cards? Are you-all sending voter registration cards to these NVRA registrants?

A No, we are not. The only ones we send it to are the ones who are registering to vote here in Warren County, because we have not completely processed those forms and we are trying to wait and see when all of them register for the state too. They haven't really told us how to handle them yet. We are waiting on our computer system to tell us how we can key them in so they can be offset for federal registration only.

[p. 14] Before the election, if everybody has voted for the state or county, then we would send them a form. Other than that, we have not sent them anything yet, just the letters.

* * *

EXHIBIT D-1

COUNTY CIRCUIT CLERKS	FOLLOWED STATE LAW	FOLLOWED SECRETARY OF STATE'S ADVICE
ADAMS		X
ALCORN	X	
AMITE	X	
ATTALA		X
BENTON	X	
BOLIVAR		X
CALHOUN	X	
CARROLL	X	
CHICKASAW	X	
CHOCTOW		X
CLAIBORNE		X
CLARKE		X
CLAY		X
COAHOMA	X	
COPIAH		X
COVINGTON		X
DESOTO		X
FORREST		X
FRANKLIN	X	
GEORGE	X	
GREENE		X
GRENADA	X	
HANCOCK	X	
HARRISON	X	
HINDS		X
HOLMES	X	
HUMPHREYS	X	
ISSAQUENA	X	
ITAWAMBA	X	
JACKSON	X	
JASPER		X

JEFFERSON	X	
JEFFERSON DAVIS	X	
JONES	X	
KEMPER	X	
LAFAYETTE		X
LAMAR	X	
LAUDERDALE	X	
LAWRENCE	X	
LEAKE	X	
LEE		X
LEFLORE	X	
LINCOLN	X	
LOWNDES		X
MADISON	X	
MARION		X
MARSHALL	X	
MONROE		X
MONTGOMERY	X	
NESHOBA	X	
NEWTON	X	
NOXUBEE		X
OKITIBBEHA	X	
PANOLA		X
PEARL RIVER	X	
PERRY		X
PIKE		X
PONTOTOC	X	
PRENTISS	X	
QUITMAN	X	
RANKIN	X	
SCOTT	X	
SHARKEY	X	
SIMPSON	X	
SMITH	X	
STONE	X	
SUNFLOWER	X	
TALLAHATCHIE		X

TATE	X	
TIPPAH	X	
TISHOMINGO		X
TUNICA	X	
UNION	X	
WALTHALL		X
WARREN		X
WASHINGTON	X	
WAYNE		X
WEBSTER	X	
WILKINSON	X	
WINSTON	X	
YALOBUSHA		X
YAZOO	X	
TOTALS	53	29

[Excerpts From Testimony of Trey Evans, Preliminary Injunction Hearing, July 19, 1995]

* * *

[p. 11] regarding the – regarding that advice from the office of the secretary of state?

A. Yes, we have.

Q. Can you tell me briefly what that training or advice – how you received that training and advice, in what form?

A. Through seminars both down here in Jackson and then periodically at other places throughout the state they've had training sessions on that aspect of it.

Q. All right. Were you given any advice regarding enrolling NVRA registrants on state voter rolls?

A. Well, what we had mostly was they covered that, of course, but they went more extensively into the purging aspects, statistical aspects of the national voter registration forms itself. I think it was just kind of left understood that we were going to be putting them on the first of the year.

Q. All right, sir. Is that the impression that you got after receiving the training from the secretary of state's office?

A. That's right.

Q. All right. After the first of the year [p. 12] when you began receiving NVRA registration forms, did you, in fact, put them on the state voter rolls?

A. No, we did not.

Q. Why did you not?

A. In the first of the year, we did not receive that many of them for the first month.

JUDGE BARBOUR: Mr. Evans, I assume when you say "we" you're talking about in your office.

THE WITNESS: In my office.

JUDGE BARBOUR: In Leflore County.

THE WITNESS: Yes, sir.

A. We did not start putting them on our regular registration rolls. Of course, that's in part to – I knew that at the time the law had not been changed to bring those type of mail-in forms in conformity to the state type mail-in forms.

Q. Are you saying that you didn't put them on the state rolls because they hadn't met state voter requirements?

A. That's right.

Q. What did you do with those NVRA registrants or registration forms?

A. What we started doing, I guess, about [p. 13] the latter part of January, somewhere in there, was that we were notifying – started notifying the individuals through a letter to notify them of this and to offer them a state mail-in form so they would be brought into compliance with the state law.

Q. Have you subsequently enrolled those NVRA registrants on special federal rolls?

A. Well, within my office what I – what I have done is I have compiled them into like a registration book just like you would have for a regular mail-in or office registration forms. We have what are called registration books that you put all the voter registration forms in, and then I put those in a book, you know, individually.

Q. All right. Have you ever enrolled NVRA registrants on state voter rolls?

A. I have not put them onto a voter rolls format yet entering them into my computer system, and the purpose to be able to do that would be able to help generate the poll books. Knowing that we did not have any federal elections coming up this year, we haven't developed our – altered our software to make notations of the difference in the two.

* * *

Article 3

Voter Registration

Subarticle A. Qualification of Electors

§ 23-15-11. Qualifications, generally.

Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upwards, who has resided in this state for thirty (30) days and for thirty (30) days in the county in which he offers to vote, and for thirty (30) days in the supervisor's district or in the incorporated city or town in which he offers to vote, and who shall have been duly registered as an elector by an officer of this state under the laws thereof, and who has never been convicted of any crime listed in Section 241, Mississippi Constitution of 1890 shall be a qualified elector in and for the county, municipality and voting precinct of his residence, and shall be entitled to vote at any election. No others than those above included shall be entitled, or shall be allowed, to vote at any election.

Supreme Court, U.S.
FILED
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(6)

No. 95-2031

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THOMAS YOUNG, *et al.*,
Appellants,

v.

KIRK FORDICE, *et al.*,
Appellees.

On Appeal From The United States District Court
For The Southern District of Mississippi

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QUESTIONS PRESENTED

1. Whether Mississippi is violating Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, by implementing dual registration procedures and other voting changes, including procedures removing thousands of previously registered voters from eligibility to vote in state and local elections, without obtaining preclearance from the United States Attorney General or the United States District Court for the District of Columbia.

2. Whether voting changes first announced by Mississippi on February 10, 1995, were implicitly precleared by a February 1, 1995, Attorney General letter addressed to a different set of circumstances, when Mississippi never submitted its February 10, 1995, changes for preclearance.

3. Whether Mississippi's voting changes are exempt from Section 5 preclearance on the ground that the changes merely corrected a misapplication of state law.

4. Whether Mississippi's voting changes are exempt from Section 5 preclearance if adopted in response to the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, plaintiffs, appellants herein,

(2) Kirk Fordice, in his capacity as Governor of the State of Mississippi, defendant,

(3) Mike Moore, in his capacity as Attorney General of the State of Mississippi, defendant,

(4) Dick Molpus, in his capacity as Secretary of State of the State of Mississippi, defendant,

(5) Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services, defendant,

(6) United States, plaintiff, and

(7) State of Mississippi, defendant.

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IN THE

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THOMAS YOUNG, *et al.*,
Appellants,

v.

KIRK FORDICE, *et al*,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The July 24, 1995, opinion of the three-judge United States District Court for the Southern District of Mississippi granting partial summary judgment to the State of Mississippi is unreported and appears in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-9a. The February 9, 1996, final judgment entered by the district court is unreported and appears at J.S. App. 10a-11a.

JURISDICTION

The final judgment of the court below, which had jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 2201, and 2284, was entered on February 9, 1996. The *Young* appellants, Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, filed their notice of appeal on April 8, 1996. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended the time in which to file a jurisdictional statement on behalf of the *Young* appellants to June 17, 1996, and they timely filed their jurisdictional statement. The Court has jurisdiction of this appeal under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Right Act, 42 U.S.C. § 1973c ("Section 5"), is set forth at J.S. App. 26a-27a. The pertinent provisions of Sections 8 and 11 of the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-6, 1973gg-9, are set forth at J.S. App. 28a. Miss. Code Ann. § 23-15-11 (1990) is set forth in the Joint Appendix ("J.A.") at 167.

STATEMENT OF THE CASE

This case arises out of the State of Mississippi's failure to comply with the preclearance requirements of Section 5 of the Voting Rights Act when it implemented changes in its voter registration and purge procedures in early 1995. Section 5 requires covered jurisdictions such as Mississippi to obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes in voting practices or procedures. 42 U.S.C. § 1973c.

The unprecleared changes at issue here were implemented as part of Mississippi's response to the passage of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.* The NVRA requires states to provide voter registration at agencies serving the public, such as drivers' license and public assistance offices, and limits the circumstances under which a registered voter's name may be removed from the voter rolls.[1] It applies only to registration and record-keeping for federal elections, although, as the court below found, states have discretion "to meld the NVRA requirements into the existing state system for registration of voters." J.S. App. 2a. The NVRA provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965." 42 U.S.C. 1973gg-9(d)(2).

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[1] The NVRA created nationwide standards requiring states to end "discriminatory and unfair registration laws and procedures" that Congress found "have a direct and damaging effect on voter participation," including disproportionate harm to racial minorities. 42 U.S.C. § 1973gg(a)(3). The primary requirements of the NVRA are: (1) states must permit voter registration simultaneously with applications for, or renewal of, drivers' licenses at motor vehicle offices, *see* 42 U.S.C. § 1973gg-3; (2) states must accept mail-in voter registration forms and make such forms widely available, *see* 42 U.S.C. § 1973gg-4; (3) states must designate and provide voter registration opportunities in public assistance offices, offices primarily engaged in providing state-funded programs for persons with disabilities, armed forces recruitment offices, and in other governmental or non-governmental offices designated by the state, *see* 42 U.S.C. § 1973gg-5; and (4) states must maintain an accurate and current voter registration roll through uniform and non-discriminatory procedures, with limits on purges of voter rolls, *see* 42 U.S.C. § 1973gg-6. The requirements of the NVRA do not apply to a handful of states that, on and after March 11, 1993, permitted election-day registration at the polls, or did not require registration as a precondition to voting. 42 U.S.C. § 1973gg-2.

Mississippi was required to implement the NVRA by January 1, 1995. 42 U.S.C. 1973gg note.

Prior to January 1, 1995, Mississippi state law provided for a unitary system of voter registration, under which one registration made a voter eligible to vote in all elections, federal, state and local. Miss. Code Ann. § 23-15-11 (1990); *see* J.S. App. 2a, 7a. Effective January 1, 1995, Mississippi election officials began implementing the NVRA under a unitary system of voter registration procedures that also made no distinction between eligibility for federal and state elections. J.S. App. 7a. The procedures establishing that unitary NVRA system received Section 5 preclearance on February 1, 1995. J. S. App. 15a-19a. However, on February 10, 1995, State officials issued a memorandum implementing a dual registration system, under which NVRA registrants, including those who had already registered assuming they would be eligible to vote in all elections, would be ineligible to vote in state and local elections unless they registered separately at the circuit clerk's office or by submitting a separate state mail-in form. J.S. App. 20a-23a. The new procedures set forth in the February 10, 1995, memorandum are changes affecting voting for which the State has never sought or received Section 5 preclearance. As a result, more than 30 years after enactment of the Voting Rights Act, Mississippi is conducting voter registration under an unprecleared and unlawful system, in defiance of Congress' mandate for Section 5 review of all changes in voting practices.

A. Voter Registration in Mississippi Prior to the NVRA.

The history of Mississippi's voting laws is a history of racial discrimination against the state's black citizens that has gradually, and with painful delay, been curbed by stringent application of the guarantees of the Voting Rights Act of 1965.

Mississippi has employed nearly every disfranchising stratagem ever devised to deprive black citizens of the right to vote: poll taxes, literacy tests, lengthy residency requirements, tests of "good moral character," white primaries, publication of registrants' names to facilitate retaliation, prohibitions on registration outside of a county clerk's office, reregistration programs, and dual registration requirements. *See* Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965*, 26-29, 185 (1990); *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1250-1252 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5th Cir. 1991). Mississippi's history of discrimination in voting was a primary impetus for Congress' enactment of the Voting Rights Act of 1965. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-313 (1966).[2] The State's continued resistance to the Act's guarantees also has been an important consideration in Congress' several extensions of the Act since 1965. Parker, *Black Votes Count*, at 180-181.

From 1892 to 1987, Mississippi maintained, in one form or another, a requirement of "dual registration" that had the purpose and effect of disproportionately denying black citizens the full opportunity to vote in all elections. *PUSH v. Allain*, 674 F. Supp. at 1252, 1255, 1268. Mississippi law required a citizen wishing to vote in municipal elections first to register with the circuit clerk of his or her county, and then to register separately with the municipal clerk. *PUSH*, 674 F. Supp. at 1248-49. This dual registration requirement "was enacted as part of the 'Mississippi plan' to deny blacks the right to vote

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[2] Mississippi is one of the seven states originally designated in their entirety as jurisdictions to which the Section 5 preclearance requirement applied. *See South Carolina v. Katzenbach*, 383 U.S. at 318.

following the Constitutional Convention of 1890." *Id.* at 1251. By 1984 Mississippi was the only state still to require dual registration. *Id.* at 1252. Even under Mississippi's dual registration requirement for municipal elections, however, registration with the circuit clerk had made a voter eligible to vote in federal as well as state elections. *See id.* at 1249.

In 1987, the *PUSH* court held that Mississippi's remaining dual registration requirements, as well as several other features of Mississippi's registration practices, had a racially discriminatory impact in depressing black voter participation and disproportionately disqualifying black citizens from voting, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *PUSH*, 674 F. Supp. at 1255. The Mississippi legislature subsequently enacted remedial legislation which the district court approved in 1989. *Mississippi State Chapter, Operation PUSH v. Mabus*, 717 F. Supp. 1189, 1193 (N.D. Miss. 1989), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

Thus, at the time the NVRA was enacted, and continuing through the present, Mississippi's statutes have provided for a unified system of voter registration, such that when qualified persons complete a single registration in their county of residence, they are eligible to vote in all local, county, state and federal elections. Miss. Code Ann. § 23-15-11 (1990); *see* J.S. App. 2a, 7a.

B. Mississippi's Response to the NVRA.

As of the effective date of the NVRA in Mississippi, January 1, 1995, some of Mississippi's registration and purge procedures were inconsistent with those permitted by the NVRA. For example, the state mail-in registration form requires the signature of an attesting witness who already is registered to vote in the applicant's county, and requires more

information than is necessary for determining voter eligibility and maintaining registration rolls, Miss. Code Ann. § 23-15-47 (1990 & Supp. 1996), all of which are prohibited by the NVRA. 42 U.S.C. § 1973gg-7(b)(1) and (b)(3). In addition, Mississippi law permits the purging of voters who have not voted in four years at the discretion of local election officials, and permits purges based on local officials' determination, without notice to the voter, that the voter is no longer qualified under state law. Miss. Code Ann. §§ 23-15-153 (1990 & Supp. 1996), 23-15-159 (1990). The NVRA prohibits purges for non-voting and requires written confirmation of information before it is used to purge a voter from the rolls. *See* 42 U.S.C. § 1973gg-6(d). The NVRA also contains more detailed requirements for registration opportunities at driver's license offices and other agencies than does Mississippi law, *compare* Miss. Code Ann. § 23-15-47(4)(b) (1990 & Supp. 1996) *with* 42 U.S.C. § 1973gg-3 and 42 U.S.C. § 1973gg-5.

Following the enactment of the NVRA in 1993, Mississippi Governor Kirk Fordice issued an executive order that named Secretary of State Dick Molpus as "the chief state election officer for the purposes of compliance with the National Voter Registration Act of 1993" and created a National Voter Registration Act Implementation Committee, which had the responsibility of "ensuring Mississippi's compliance with the Act." Young Plaintiffs' Cross-Motion For Summary Judgment, Ex. 1. The Implementation Committee included the chairs of the Mississippi House and Senate election committees, representatives of the Mississippi Attorney General's office, the Governor's office, and the Secretary of State's office, and representatives of several other state agencies and organizations. J.A. 77-78.

Starting in February 1994, the Secretary of State's office, in conjunction with the Implementation Committee,

developed written materials and registration forms to be used by circuit clerks and other local officials in implementing the revised registration and purging procedures prompted by the NVRA. *See* J.S. App. 2a; J.A. 14-25. The materials included a manual, first published in July 1994 and published in final form in November 1994, to guide the registration activities of these public officials and employees, J.A. 26-49, and a set of instructions to be used by personnel at the drivers' license bureaus, public assistance agencies, and other offices designated to conduct registrations. J.A. 51-60. They also included new voter registration forms to be used at agencies, J.A. 61-66, and a redesigned mail-in registration form that conformed to NVRA requirements and eliminated the requirement of an attesting witness. J.A. 50. The new procedures and forms were to be implemented as of January 1, 1995. J.A. 14, 22, 110. None of these new procedures and registration forms made any distinction between registration for federal elections and registration for other elections, nor suggested that the new procedures would result in eligibility only for federal elections.

The new procedures were widely disseminated and publicized in 1994. The Secretary of State's office sponsored numerous training sessions throughout the state for local election officials, members of the public, and personnel of the agencies that would become voter registration sites under the NVRA. J.S. App. 2a; J.A. 14-25, 76-77. The NVRA manual, J.A. 26-49, was distributed at these sessions. J.A. 14-25. The purpose of these training sessions was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." J.A. 22; *see* J.A. 24-25 (describing meeting attended by 133 officials representing 68 counties).

In 1994 the Mississippi Legislature adopted one statutory change to facilitate implementation of the NVRA,

moving back the last date for accepting mail-in voter registration from 60 to 30 days before an election. Comp. ¶ 35; Amended Ans. ¶ 35. Legislation to conform Mississippi's practices to the NVRA more generally was the subject of a Senate Election Committee hearing in November 1994, J.A. 85, and was introduced in the January 1995 legislative session. J.S. App. 21a.

C. Mississippi's December 1994 Submission to the United States Attorney General.

In the latter part of 1994, the Department of Justice learned that Mississippi planned to implement administratively its new registration procedures starting January 1, 1995, although none of the State's implementation plans, revised forms, or training materials, which described substantial changes in voter registration procedures, had been submitted for Section 5 preclearance. The Department of Justice informed the Secretary of State that preclearance of these new procedures and forms was necessary prior to their implementation, sending a formal "please submit" letter to the Secretary of State on December 5, 1994. J.A. 105.

The Secretary of State's office complied with the request, submitting to the Department of Justice materials setting forth the NVRA practices that were to be implemented "prior to the passage of the state legislation." J.A. 107-108. On December 20, 1994, the Secretary of State formally requested preclearance for this implementation plan:

> [C]onsider this letter as a request for preclearance under Section 5 of the Voting Rights Act of Mississippi's plan to administratively implement the provisions of NVRA, in accordance with the package of

> materials which were submitted to your office on December 5 and December 14, 1994.
>
> In particular, please regard the publication dated November 1994 and entitled "The National Voter Registration Act" as Mississippi's plan to administratively implement NVRA on January 1, 1995.

J.A. 109-110 (letter dated December 20, 1994, from Constance Slaughter-Harvey, General Counsel to the Secretary of State and Assistant Secretary of State, Elections). The November 1994 manual described a set of registration and record-keeping procedures to be used generally by circuit clerks and other election officials, with no provisions indicating that a separate set of registration requirements and procedures would be maintained for state and local elections.

Indeed, the new voter registration forms that were included in the Section 5 submission and that were to be used beginning January 1, 1995, make no distinction between eligibility for state and federal elections. For example, the new registration form for use at the driver's license agency stated: ". . . *you may apply to register to vote in Mississippi* while renewing your driver license. If you would like to apply to register to vote, complete Sections 1 and 2 of this form . . . ." J.A. 45 (emphasis added). Similarly, the new form to be used at public assistance agencies asked: "If you are not registered to vote where you now live, would you like to register to vote here today?" J.A. 46. The revised mail-in form contains similar language, stating "If you are not registered to vote where you now live, you can use this form to register to vote or report that your address has changed." J.A. 50. Nothing in these forms advises the applicants that their registration will be invalid for state and local elections.

Further, among items under the heading "Current methods that will change," the manual included the following statements: "'the optional 4-year purge is prohibited', [and] "a registrant's name cannot be removed solely for not voting." J.A. 35. Again, these instructions did not suggest that the new limitations on voter purges would apply only to federal elections.

In addition to the manual, the packet of materials sent to the Attorney General included background materials such as Implementation Committee reports, J.A. 67-73, schedules of training that had occurred, J.A. 14-25, newsletters published periodically by the Secretary of State, J.A. 74-84, and the draft legislation to be introduced in early 1995. J.A. 86-104. Among these background materials was a July 1994 "Status Report" that included, in a list of "New Legislation," the phrase "Make NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. No procedures establishing a dual registration system, however, were ever submitted to the Attorney General.

D. Implementation of the NVRA Plan.

In January 1995, local officials began implementing the Secretary of State's administrative plan set forth in the November 1994 manual. Drivers' license offices and other designated agencies began accepting voter registration applications on the forms developed by the Secretary of State, and forwarding those registrations to the circuit clerks of their respective counties. *See* February 25, 1995, memorandum, Status Report on NVRA, J.A. 114 (estimating that 4,000 citizens registered under NVRA since January 1, 1995). Based on the Secretary of State's instructions, many circuit clerks added these registrants to the voter rolls for all elections. Defendants' Itemization of Facts, ¶ 10, June 19, 1995; *see also*

J.S. App. 6a, 7a.[3] Others accepted NVRA applications on the new forms but did not immediately add those registrants to the rolls for state elections. Ex. D-1, J.A. 167. Whether a particular circuit clerk placed the NVRA registrant on the rolls for all elections or for federal elections only, the registration forms given to applicants at driver's license offices and other designated agencies were the forms included in the Secretary of State's Section 5 submission -- forms that did not advise applicants that they were registering only for federal elections. *See*, Evans Test., 7/19/95 Prelim. Inj. Tr., at 16-17; Horton Dep., J.A. 132; J.S. App. 7a ("A few thousand . . . citizens were registered under NVRA procedures between January 1 and February 10 under the assumption of eligibility for all elections.")

On January 25, 1995, the Mississippi Senate Elections Committee, chaired by State Senator Kay Cobb, tabled the bill that was designed to amend Mississippi's election statutes so as to integrate the NVRA requirements.[4] J.S. App. 21a. The United States Attorney General was aware of the committee's

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[3] According to an informal survey conducted by personnel of the Mississippi Attorney General's office for an evidentiary hearing held on the United States' motion for preliminary injunction, 29 of Mississippi's 82 circuit clerks added NVRA registrants to the existing voting rolls for all elections, state, federal and local. J.A. 161. These included the circuit clerk for Hinds County, the State's most populous county.

[4] This was the last day that bills could be voted out of committee in the regular session. It was still possible, however, for the legislature to vote to suspend the rules and bring the bill to the floor. J.S. App. 21a. Thus, tabling the bill in committee did not necessarily mean that the legislature could not act on the bill later in the session. J.A. 115. Although the legislature would remain in session for almost three more months, no vote to suspend the rules and bring the bill to the floor was taken.

action, but the State did not amend or withdraw its Section 5 submission. State officials communicated in writing with Justice Department officials concerning various aspects of the submission between January 25th and January 31st, but those communications do not address the legislative committee's action, nor its impact, if any, on Mississippi's plans for administering the NVRA. *See, e.g.*, J.A. 111-113 (letter of January 30, 1995).

On February 1, 1995, the United States Attorney General, acting through the Department of Justice, precleared the State's plan to implement administratively the NVRA "as described in the publications of the Office of the Mississippi Secretary of State ('The National Voter Registration Act' (November 1994) and 'the National Voter Registration Act: Agency Registration Procedures') and as subsequently clarified by the January 30, 1995, letter from your office." J.S. App. 15a.[5] The Attorney General's preclearance letter addressed only the changes set forth in the Secretary of State's submission, and makes no mention of any change from Mississippi's unified system of voter registration to a dual system of registration. J. S. App. 15a-19a.

E. Mississippi's Change to a Dual Registration System.

On February 10, 1995, Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State's Office, issued a memorandum to Mississippi circuit clerks and the chairpersons of the Mississippi County Election

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[5] The documents referred to appear at J.A. 26-49 (November 1994 manual), J.A. 51-60 (agency registration procedures), and J.A. 111-113 (letter of January 30, 1995). The document referred to as "The National Voter Registration Act (November 1994)" is the same document referred to in this brief as the November 1994 manual.

Commissions. J.S. App. 20a-23a. Explaining that the Senate Elections Committee had tabled the anticipated state NVRA legislation, the memorandum stated that its purpose was "to offer additional direction to circuit clerks and county election commissioners as to how they should proceed." J.S. App. 20a.

First, the memorandum announced that "Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections," J.S. App. 21a. The memorandum acknowledged that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections." *Id.* The memorandum therefore asked circuit clerks to notify NVRA registrants of their limited eligibility to vote, and to provide "the opportunity to register for state elections." J.S. App. 21a.

Second, to prevent NVRA registrants from voting in state elections, the memorandum directed circuit clerks to adopt procedures for distinguishing NVRA registrants from other registrants on their voting rolls. J.S. App. 22a. It stated that "circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must 'flag' voters registered under NVRA on the voter registration books and poll books to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections." J.S. App. 21a-22a.

Third, the memorandum gave directions as to which aspects of the purge procedures set forth in the November 1994 NVRA manual (the manual precleared by the United States Attorney General) were still operative. J.S. App. 22a-23a. Contrary to the instructions of the November 1994 NVRA manual, the February 10, 1995, memorandum stated that "there is no legal requirement that NVRA purging procedures be

implemented this year." J.S. App. 22a. Among other matters, the memorandum instructed circuit clerks that they could resume state-law purges for change of address, but could not thereby cancel the voter's eligibility for federal elections without following confirmation procedures described in the memorandum. J.S. App. 22a-23a.

In implementing the State's new dual registration system, Mississippi circuit clerks have adopted varying practices for establishing the limited eligibility of NVRA registrants, notifying such registrants of their limited eligibility, and providing opportunities to register for state elections. For example, some clerks send NVRA registrants only a letter telling them that they will be limited to voting in federal elections and advising them that they may register separately for state and local elections, without enclosing any state voter registration form. Williams Dep., J.A. 159. Other clerks send NVRA registrants a letter along with a blank state form, but do not provide postage for returning the form. Dunn Dep., J.A. 135-136, 139. Others go much further, sending a notification letter accompanied by a partially completed state registration form, with pre-paid return postage, and following up with telephone calls. Salazar Dep., J.A. 141-145.

The February 10, 1995, memorandum thus instituted numerous changes in Mississippi's registration procedures, whether measured against the procedures in effect as of December 1994 or those the State had implemented from January 1 through February 10, 1995. *See, e.g.*, Horton Dep., J.A. 133 ("Q. Have you in the past in your time in the circuit clerk's office had to send out letters with state mail-in forms, for example, telling people they were only registered for certain elections? A. No."); Simmons Dep., J.A. 126-127 ("Q. Now, as far as these things that you are doing to go out and catch up with these people who've registered under the NVRA, are these

things you've ever had to do before, or is this something new? A. This is something new.")

The result of these new procedures is the division of the electorate into two classes of voters for the first time since the resolution of the *PUSH v. Allain* litigation. All of these voters meet the same statutorily defined voter eligibility criteria,[6] and differ only in what forms they fill out and at what site they obtain a registration form. Mississippi is now the only state that does not permit NVRA registrants to vote in state and local elections.[7]

F. The Department of Justice's Response to the Creation of a Dual Registration System.

On February 16, 1995, the Department of Justice sent a letter informing the State that the voting procedures described in the February 10, 1995, memorandum constituted unprecleared changes that had not been submitted by the State for Section 5 review, and that they were legally unenforceable

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[6] NVRA registrants, like all other Mississippi registrants, must be citizens of the United States, eighteen years of age or older, mentally competent, and have resided for 30 days in the state, county, supervisor's district, and municipality (if any) in which they wish to vote. In addition, they must not have been convicted of any of a list of disqualifying crimes. *Compare* Miss. Code Ann. § 23-15-11(1990) *with* oath set forth in NVRA registration forms, J.A. 44, 45, 46, 50, 63, 64, 65, and 66.

[7] In Illinois, the legislature also failed to pass legislation merging the NVRA with state practices, and the state administratively implemented a dual registration system, but the requirement of dual registration was subsequently invalidated on state constitutional and statutory grounds. *Orr v. Edgar*, 95 CO 0246 (Ill. Cir. Ct. May 1, 1996), *aff'd*, 1996 WL 549559 (Ill. App. 1 Dist. September 26, 1996).

until they had received Section 5 preclearance. J.S. App. 24a-25a.

On March 9, 1995, the State responded to this letter by asserting that it had "not initiated, nor implemented any change affecting voting within the State, other than the implementation of the NVRA . . . . The changes affecting voter registration most recently implemented by the State are those mandated by NVRA, not any change initiated or instituted by the State." J.A. 117-118. To this date, the State of Mississippi has not filed a Section 5 submission regarding these voting changes and has continued to implement them without preclearance.

G. Proceedings in the District Court.

Appellants Thomas J. Young, Richard L. Gardner, Eleanor Faye Smith, and Rims Barber, citizens of the State of Mississippi who meet the State's qualifications to register to vote, filed suit against Governor Kirk Fordice and other executive officials on April 20, 1995.[8] The Young plaintiffs sought declaratory relief under Section 5 of the Voting Rights Act and the NVRA, and an injunction against further implementation of unprecleared changes. The United States filed suit the same day, seeking similar relief, and the district court consolidated the two actions.

Specifically, Count II of the Young plaintiffs' complaint alleged that the State's changes related to voter registration and

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[8] The other defendants below were Mike Moore, Attorney General of Mississippi, Dick Molpus, Secretary of State of Mississippi, and Don Taylor, Executive Director of the Mississippi Department of Human Services. Mr. Taylor, the current Executive Director, was substituted for Gregg Phillips, who was Executive Director when the suit was instituted.

purging had not been precleared and that their enforcement accordingly violated Section 5 of the Voting Rights Act. Comp. ¶ 2. Plaintiffs alleged that the procedures initiated by the State's February 10, 1995 memorandum were unprecleared changes from the State's pre-NVRA statutory unitary registration system, in violation of Section 5. *Id.* ¶ 68. They also alleged that the February 10, 1995 memorandum initiated changes from the precleared unitary NVRA implementation plan that the State had implemented starting January 1, 1995. *Id.* ¶ 69. The State's answer denied that the voting changes were subject to preclearance, alleging that changes made to comply with the NVRA were outside the scope of Section 5, and that the changes presented in the Secretary of State's Section 5 submission had not been applicable to state or local elections. Ans. ¶¶ 41, 43.

A three-judge court was convened to hear the Section 5 claim pursuant to 42 U.S.C. § 1973c. All parties subsequently moved for partial summary judgment on the Section 5 cause of action. The Young plaintiffs' cross-motion for summary judgment requested, among other relief, a permanent injunction prohibiting the defendants from implementing the unprecleared changes, and requiring that NVRA registrants be permitted to vote in all elections. The United States, in addition, filed a motion for a preliminary injunction.

In a decision that cited no case authority, the district court granted the State's motion for summary judgment as to the plaintiffs' Section 5 claims on July 24, 1995, holding that Mississippi was not required to obtain Section 5 preclearance for the changes that established the dual registration and purging system. The district court held that the United States Attorney General's February 1, 1995, preclearance letter had not served to preclear the unitary registration system submitted by the Mississippi Secretary of State, because the Secretary of

State lacked authority to implement such a unitary system without passage of new legislation by Mississippi. J.S. App. 7a. The court then held that "it is equally clear -- and this does not appear to be in dispute -- that the contents of the package regarding only administrative decisions of the state have been precleared." J.S. App. 8a. Although the court did not identify with precision the "administrative decisions" that were deemed precleared, it apparently concluded that the United States Attorney General had selectively precleared some changes in registration procedures *only for use in relation to federal elections*, even though the State's Section 5 submission had not distinguished between federal and state elections.[9] The court believed that this redefinition of the February 1, 1995 preclearance letter was required because the Attorney General could not have intended to preclear a unitary registration system when she was aware that the Mississippi Legislature had not yet enacted proposed conforming legislation. J.S. App. 7a-8a.

Because the court believed that implementation of the unitary NVRA system beginning January 1, 1995, was unauthorized, it further concluded that the instructions in the State's February 10, 1995, memorandum should not be considered changes, but instead were merely corrections of previous unauthorized practices:

> We hold that the February 10 letter did not effect a change subject to § 5 preclearance. We hold that the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining

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[9] The plaintiffs consistently argued that the February 1, 1995, preclearance letter did not effect preclearance of changes for use in a dual registration system. Complaint, ¶¶ 48, 53, 56, and 59; Cross-Motion for Summary Judgment, ¶ 6.

> preclearance of the United States Attorney General. Practically speaking, any other conclusion would be absurd.

J.S. App. 8a. The court found that no "ratification" had occurred because "there was no evidence that the governor, the legislature, or the Mississippi Attorney General condoned the month long practice on the part of some election officials to qualify voters contrary to applicable state law." J.S. App. 8a.

Finally, the Court accepted the State's argument that adoption of a dual registration system in response to an enactment of Congress did not reflect a change covered by Section 5 because Mississippi was merely complying with federal law:

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. J.S. App. 8a-9a.

On September 7, 1995, the district court denied without opinion the United States' motion for reconsideration of its decision on the Section 5 claims. J.S. App. 10a. After the parties voluntarily resolved the claims based on the NVRA, the court entered final judgment on February 9, 1996. J.S. App. 10a-11a.

SUMMARY OF ARGUMENT

The preclearance requirement of Section 5 of the Voting Rights Act covers, at its very core, changes in any practices affecting the opportunity to register to vote. Mississippi is one of the states whose history of racial discrimination in voting prompted Congress to enact Section 5 in 1965 and to extend it three times. Statement of the Case, *supra*, at 4-6. Despite Mississippi's status as a Section 5-covered jurisdiction, the State implemented substantial changes in its voter registration practices through its February 10, 1995, memorandum, and has neither sought nor obtained Section 5 preclearance for those changes. By permitting Mississippi to "forgo the preclearance process altogether," *Clark v. Roemer*, 500 U.S. 646, 659 (1991), the decision below ignored controlling law and undermined Section 5's critical safeguards against discrimination.

Time and again, this Court's decisions enforcing the preclearance requirement have rejected a regime of uncertain, case-by-case determinations of the need for preclearance, in favor of clear commands: all changes in practices related to voting must be submitted for Section 5 review by the United States Attorney General or the District Court for the District of Columbia; all proposed changes must be unambiguously identified when they are submitted; and no decision on the merits of a proposed change may be rendered by a local three-judge district court, such as the court below. The court below did not apply, distinguish, or even mention any of the controlling decisions of this Court that establish these commands. Because Mississippi's voting changes have not received preclearance and are not exempt from the preclearance requirement, the district court's decision must be reversed.

1. The district court's decision conflicts with *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Clark v. Roemer*, by holding that the Attorney General's February 1, 1995, preclearance of a unitary voter registration system submitted by the Mississippi Secretary of State implicitly precleared later changes that created separate systems of voter registration and purging for federal and state elections in Mississippi. Mississippi's Section 5 submission never identified at all, much less "with specificity," *Clark*, 500 U.S. at 658, any procedures or practices that would create separate systems of registration and purging for federal and state elections, nor any procedures for canceling the eligibility of NVRA registrants to vote in state and local elections. Section 5 places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes, *McCain*, 465 U.S. at 249. Any ambiguity as to what was submitted must be resolved against the State. *Clark*, 500 U.S. at 659. The district court therefore erred in accepting Mississippi's after-the-fact effort to redefine the State's Section 5 submission as an implicit request for preclearance of a dual system.

2. The district court further erred in holding that Mississippi's February 10, 1995, voting changes were exempt from preclearance.

A. Mississippi's February 10, 1995, voting changes were not exempt from the preclearance requirement on the ground that the changes merely corrected "a misapplication of state law." J.S. App. 8a. This ruling squarely conflicts with *Perkins v. Matthews*, 400 U.S. 379 (1971), in which this Court held that covered jurisdictions cannot avoid the preclearance requirements of Section 5 by treating their own previous voting procedures as a nullity based on their alleged conflict with state law. Because the voting procedures initiated in the State's

February 10, 1995, memorandum reflect a change from the practices "*in fact* 'in force or effect'" prior to February 10, 1995, Mississippi was required to secure Section 5 preclearance before implementing them, regardless of the legal status under state law of the practices previously in use. *Perkins*, 400 U.S. at 395 (quoting Section 5).

Indeed, under *Perkins* and other decisions, the motives of the State in making a voting change are irrelevant in a Section 5 enforcement action such as this, because a local three-judge district court does not have jurisdiction to determine whether voting changes were in fact adopted for a benign purpose or a discriminatory one. The only questions for the court are whether Section 5 covers the contested change, whether the state has satisfied the Section 5 approval requirements, and, if Section 5's requirements have not been satisfied, what relief is appropriate. *Lopez v. Monterey County*, 1996 WL 637045, at *7 (U.S. November 6, 1996); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). The motives and justifications for the State's voting changes will become relevant only if and when Mississippi submits its procedures for Section 5 review by the United States Attorney General or the United States District Court for the District of Columbia. Conditioning the requirement of preclearance review on a case-by-case examination of the legality of the state's past practices would thwart Congress' determination that "[t]he prophylactic purposes of the § 5 remedy are achieved by automatically requiring 'review of *all* voting changes prior to implementation by the covered jurisdictions.'" *McDaniel v. Sanchez*, 452 U.S. 130, 151 (1982) (citation omitted).

Furthermore, the procedures initiated by the State's February 10, 1995, memorandum constitute changes from the voting practices in place prior to January 1, 1995, as well as from those implemented in early 1995. Because the State was

obligated to obtain preclearance at some point, treating the Secretary of State's Section 5 submission and the Attorney General's preclearance determination as nullities would not alter the conclusion that the State has implemented unprecleared voting changes in violation of Section 5.

B. Finally, the district court opened a gaping loophole in Section 5 coverage by holding that voting changes are exempt from the Section 5 preclearance requirement when made to comply with a federal statute such as the NVRA. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), this Court rejected precisely that argument, holding that voting changes made by covered states are not exempt from preclearance even when implemented in an effort to comply with the Voting Rights Act itself. *Id.* at 565 n. 29. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992) ("[T]he scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting. . . .") Further, the district court's holding ignores the express language of the NVRA, which provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965." 42 U.S.C. § 1973gg-9(d)(2).

For all these reasons, this Court should reverse the decision of the court below and direct that the court enter appropriate relief enjoining further implementation of the unprecleared dual registration procedures established by the State's February 10, 1995, memorandum, unless and until the State obtains Section 5 preclearance for its voting changes.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT VOTING CHANGES FIRST ANNOUNCED BY MISSISSIPPI ON FEBRUARY 10, 1995, WERE PRECLEARED BY A FEBRUARY 1, 1995, ATTORNEY GENERAL PRECLEARANCE LETTER ADDRESSED TO A DIFFERENT SET OF CIRCUMSTANCES.

Section 5 requires that before a covered jurisdiction such as Mississippi "shall enact or seek to administer" any change in procedures or practices affecting voting, it must first obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c, J.S. App. 26a-27a. If a covered jurisdiction has not obtained preclearance for changes in its voting practices or procedures, "§ 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Clark*, 500 U.S. at 653 (citing *Allen*, 393 U.S. at 572); *Lopez v. Monterey County*, 1996 WL 637045, at *7.

In an action such as this, alleging that a covered jurisdiction has instituted voting changes without the required preclearance, the local three-judge district court does not have jurisdiction to determine "whether the changes at issue . . . in fact resulted in impairment of the right to vote, or whether they were intended to have that effect." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Instead, the only questions for the court are "(i) whether a change is covered by § 5, (ii) if the change is covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements have not been satisfied, what relief is appropriate." *McCain*, 465 U.S. at 250 n.17; *Lopez*, 1996 WL 637045, at *9; *City of Lockhart*, 460 U.S. at 129 n.3.

Mississippi had a unitary voter registration system as of December 1994, under which one registration made a voter eligible to vote in all elections, federal, state and local. State officials in Mississippi developed a unitary system incorporating the registration and purge requirements of the NVRA, submitted that plan to the United States Attorney General for Section 5 preclearance in December 1994, and began implementing that plan as of January 1, 1995, registering thousands of voters "under the assumption of eligibility for all elections." J.S. App. 7a. On February 10, 1995, however, state officials determined that a different set of registration procedures should be instituted in the wake of the tabling of proposed NVRA legislation -- procedures establishing a two-tier system under which NVRA registrants would be eligible to vote only in federal elections absent a separate registration under separate state procedures. J.S. App. 20a-23a.

Once the State decided to implement the NVRA in that manner, it had to make numerous additional discretionary choices. The State had to determine, for example, the procedures for notifying NVRA registrants of their limited eligibility status, the procedures for canceling the state-election eligibility of those who had already registered, the procedures for offering or publicizing the opportunity to re-register for state and local elections, the procedures for separating federal-election-only registrants from all other registrants on election day, and the procedures for implementing the NVRA's purge limitations with respect to federal elections. *See supra* pp. 14 - 15. All of these procedures directly affect access to the franchise and therefore fall within the Section 5 preclearance

requirement.[10] Mississippi, therefore, could not lawfully implement the dual registration system set forth in the State's February 10, 1995, memorandum, without securing preclearance.

The district court ruled that the State had obtained the necessary preclearance, stating "the contents of the package regarding only administrative decisions of the state have been precleared." J.S. App. 8a. The district court thus treated the United States Attorney General's February 1, 1995, preclearance letter as implicitly authorizing the procedures necessary to implement the NVRA for federal elections only -- even though the procedures set forth in the State's Section 5 submission did not distinguish between federal and state elections. The court believed that this redefinition of the February 1, 1995, preclearance letter was required because the Attorney General could not have intended to preclear a unitary registration system when she was aware that the Mississippi Legislature had not yet enacted proposed conforming legislation. J.S. App. 7a-8a.

The court below erred as a matter of law in concluding that the Attorney General implicitly precleared procedures applicable to federal elections only. This Court has emphatically

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[10] The Act defines "vote" and "voting" as including "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this act, or other action required by law prerequisite to voting." 42 U.S.C. § 1973l(c)(1). The Attorney General's regulations enforcing Section 5 include as examples of voting changes: "(a) Any change in qualifications or eligibility for voting," and " (b) Any change concerning registration, balloting, . . . and any change concerning publicity for or assistance in registration or voting." Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.12 (1996) and § 51.13 (1996).

rejected the concept of preclearance by implication, because "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *McCain*, 465 U.S. at 249. Section 5 thus places upon covered jurisdictions the responsibility of submitting proposed voting changes to the Attorney General, and informing the Attorney General of the nature of those changes. *Id.*

To comply with that obligation, as this Court unanimously held in 1991, a covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider," *Clark*, 500 U.S. at 658. "'[A]ny ambiguity in the scope of the preclearance request' must be construed against the submitting jurisdiction." *Id.* at 659 (citation omitted). As the Court explained in *Clark*, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." *Id.* at 658. *See also Dupree v. Moore*, 831 F. Supp. 1310 (S.D. Miss. 1993), *vacated and remanded for clarification*, 115 S.Ct. 1684 (1995), *on remand*, No. 490-0043(2) (S.D. Miss. Dec. 29, 1995), *aff'd*, 116 S.Ct. 2493 (1996).

Here, the only submission that received preclearance from the United States Attorney General on February 1, 1995, was the Secretary of State's December 1994 submission of a set of voting changes to be used for registration generally, without restrictions on a voter's eligibility for all elections. That request for preclearance failed to identify at all, much less "with specificity," the many procedures that are required to implement the dual system set forth in the State's February 10, 1995, memorandum. *Clark*, 500 U.S. at 658. Unlike the February 10, 1995, memorandum, the December 1994 submission included no procedures establishing a two-tier system of voter

registration and record-keeping, no provisions for separate sets of voter purge procedures distinguishing NVRA registrants from state registrants, and no procedures for notifying NVRA registrants of their restricted eligibility. *See supra* pp. 9 - 13. The February 1, 1995, preclearance letter did not, and could not, provide preclearance for changes that were not part of the submission.

Indeed, the impact of the new registration forms, and the other practices and procedures for which the Secretary of State sought preclearance, cannot be "view[ed] . . . in isolation" from the unitary registration system of which they were to be a part, without frustrating meaningful Section 5 review. *City of Lockhart*, 460 U.S. at 131 (holding that § 5 preclearance requirement applied to continued use of numbered posts when city added two new seats to city council, even though numbered post requirement was not itself new). To illustrate, a voter registration form that does not identify the elections for which the registrant will be eligible may be perfectly innocuous and acceptable if an applicant who fills out the form will in fact be eligible to vote in all elections. That same form, however, may be misleading and, indeed, deceptive, if the circuit clerks who receive the form intend to exclude the registrant from voting in state and local elections absent a separate registration under separate procedures. Such considerations underscore the importance of applying preclearance determinations only to changes that are fully and unambiguously identified in the submission.

The district court's conclusion that changes implementing a dual registration system could be precleared by implication is particularly troubling as applied to Mississippi, where a federal court in 1987 struck down as racially discriminatory the State's previous requirement of separate registration for state and municipal elections. *PUSH v. Allain*,

674 F. Supp. at 1255, 1268. Under a system of dual registration voters who take advantage of liberalized registration procedures for federal elections may not realize that their registration is invalid for state and local elections, and may appear at the polls on election day only to be turned away. As State officials and legislators surely knew when the proposed state legislation was under consideration, the district court in *PUSH* found that black voters in Mississippi were disproportionately disqualified from voting in municipal elections under Mississippi's prior dual registration requirement. *Id.* Furthermore, the State's February 10, 1995, memorandum exacerbates the potential for discrimination by granting wide discretion to circuit clerks to determine how to set up and implement the new dual registration requirement. *Cf. PUSH*, 674 F. Supp. at 1267 (finding that "widespread variations among counties in voter registration practices, as attested to by the various circuit clerks, may result in the unequal treatment of similarly situated persons").[11] Given the clear "*potential* for

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[11] As recounted in *PUSH*:

> In the March 10, 1987 municipal Democratic primary election in the City of Marks, Mississippi, 56 voters who had registered to vote with the Quitman County Circuit Clerk prior to August 3, 1984, but who had not registered with the Marks Municipal Clerk, were required to cast affidavit ballots by election officials. These affidavit ballots were later rejected and not counted by the Marks Municipal Democratic Committee. All 56 of these voters were black. In that election, two black candidates for the board of aldermen lost by voter margins less than the number of affidavit ballots that were rejected.

674 F. Supp. at 1255. *See also* Hearings on Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, 97th Cong., 1st Sess. (1981), at 2643 (testimony of Robert M. Walker, Mississippi Field

discrimination" inherent in such changes to Mississippi's registration practices, *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 181 (emphasis original), it would frustrate the core purposes of Section 5 if covered states such as Mississippi could obtain preclearance for such procedures through a submission that does not identify them unambiguously and "with specificity." *Clark*, 500 U.S. at 658.

Although the United States Attorney General, before issuing the February 1, 1995, preclearance letter, was aware that the State's proposed legislation had been tabled in committee, that awareness does not transform the State's December 1994 submission into something it was not, and does not satisfy the requirement of a specific submission of the February 10, 1995, changes. The State did not withdraw or alter its Section 5 submission after the legislation was tabled on January 25, 1995. Even if the Attorney General could be charged with knowledge that the State might now wish to alter

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Director, NAACP, describing similar practices in numerous Mississippi localities).

In addition to the discriminatory practices resulting from the prior dual registration requirement, Mississippi counties have periodically resorted to so-called "reregistration" programs through which the registration of all voters in the county would be canceled, and new registration required, for the alleged purpose of eliminating unqualified voters from the rolls. As an Attorney General letter objecting to one such reregistration program noted: "The manner in which the reregistration was conducted resulted in the registration of less than 75% of the voters and the failure of over 25% of the black voters to requalify." Hearings before the Civil Rights Oversight Committee of the Committee on the Judiciary, 92nd Cong., 1st Sess. (1971), at 293 (reprinting Attorney General's letter). *See also id.* at 88-89, 97-99, 271-274, 276, 320. Actual experience in Mississippi thus confirms the discriminatory potential of changes such as those at issue here.

its NVRA implementation procedures in light of the legislative committee's action, it is not sufficient that the Attorney General may have known of a potential change; the responsible authorities must "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Allen*, 393 U.S. at 571. *See also NAACP v. Hampton County*, 470 U.S. at 182 ("A change that was never submitted at all does not meet . . . [the *Allen*] standard").

The State has pointed to one phrase in a background document submitted to the Attorney General as constituting the required submission of the State's dual registration procedures. The phrase appears in a list entitled "New Legislation" included in a July 1994 "Status Report," J.A. 67-73, and states in full "Make NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. The list in which this phrase appears was not part of the November 1994 manual which the Secretary of State described as the State's NVRA submission. *See* J.A. 110 ("please regard the publication dated November 1994 and entitled 'the National Voter Registration Act' as Mississippi's plan to administratively implement NVRA on January 1, 1995"). There is simply nothing in the State's November 1994 NVRA manual setting out procedures for implementing a dual registration system. Thus, the buried nugget on which the State relies does not remotely serve to discharge the State's burden "to identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 656; *see McCain*, 465 U.S. at 251-255.[12]

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[12] The district court emphasized that, under the Attorney General's Section 5 regulations, the Attorney General "'will not consider on the merits . . .[a]ny proposal for a change affecting voting submitted prior to final enactment or administrative decision.'" J.S. App. at 7a, quoting 28 C.F.R. § 51.22 (1994). The district court reasoned that the

Indeed, the facts in *McCain* and *Clark* presented a stronger case for recognizing a doctrine of implicit preclearance than those presented here, had this Court been inclined to adopt a doctrine so at odds with the purposes of Section 5. In *McCain*, the United States Attorney General granted preclearance to a 1971 South Carolina statute increasing the size of the county council from three seats to five seats. The seats were to be elected under a system of government created by a 1966 statute that had not itself received preclearance. Even though the United States Attorney General actually requested a copy of the 1966 statute and examined it during the Section 5 review process, this Court held that preclearance of the 1971 statute did not serve to preclear the 1966 statute, because the county never expressly asked the Attorney General for approval of the 1966 statute. *McCain*, 465 U.S. at 253

Attorney General's February 1, 1995, preclearance letter therefore should be read as granting selective preclearance only to the use of NVRA procedures for federal elections, because broader state legislation had not been enacted. J.S. App. 7a-8a. That reasoning is faulty. The Secretary of State's submission clearly advised the United States Attorney General that state election officials were planning to implement the procedures set forth in the November 1994 NVRA manual as of January 1, 1995, without awaiting legislative action. J.A. at 109-111 (submitting plan "to administratively implement NVRA on January 1, 1995"). Thus, in addressing the State's Section 5 submission, the Attorney General was addressing a "final . . . administrative decision" regarding the practices the State intended to follow beginning January 1, 1995. 28 C.F.R. § 51.22 (1994). Indeed, Texas, like Mississippi, administratively implemented the NVRA on a unitary basis through action of the Secretary of State, prior to action by the state legislature. *See* Attach. R, U.S. Mot. For Prelim. Inj. and Summ. Judg. (Section 5 submission letter from Texas Secretary of State, dated October 7, 1994). The Justice Department's regulations thus do not authorize the district court's conclusion that the Attorney General implicitly precleared a dual registration system in Mississippi.

(Attorney General's "request for and receipt of this information in no way suggest that he approved changes that he was not requested to approve"). Similarly, in *Clark*, where the Attorney General had precleared the creation of additional elected judgeships for certain Louisiana courts, this Court rejected the argument that seats added to those courts earlier were implicitly precleared as well, because the State had made no separate request to preclear those earlier seats. *Clark*, 500 U.S. at 657.

Here, the State seeks to rely on the Attorney General's implicit knowledge not of *past* enactments that were arguably encompassed by the submitted change, but potential *future* changes the State might be likely to seek in the wake of the Mississippi legislature's action -- a broader doctrine of implicit preclearance than was rejected in *McCain* and *Clark*. There is no warrant for a Section 5 doctrine that would create such uncertainty about the scope of an Attorney General preclearance decision.[13]

Finally, the district court further departed from the teachings of *McCain v. Lybrand* by failing to give deference to the United States Attorney General's determination that the February 10, 1995, changes were outside the scope of the previous preclearance decision. As noted above, in this case the Justice Department responded to the State's February 10, 1995, memorandum with a letter dated February 16, 1995, stating that the Department had not precleared voting changes for a dual registration system, and requesting that the changes described in the memorandum be submitted for preclearance

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[13] The court below concluded that the February 1, 1995, letter could be construed as precleaning the February 10, 1995, changes without applying, distinguishing, or even citing this Court's decisions in *McCain v. Lybrand*, *Clark v. Roemer*, and similar cases. Those decisions, of course, were cited to the court by the parties below.

prior to implementation. J.S. App. 24a. Under *McCain*, the district court owed deference to that determination. 465 U.S. at 255-56.

In sum, this Court's controlling precedents require rejection of the district court's theory that the February 1, 1995, preclearance letter selectively and prospectively precleared the voting changes first described in the State's February 10th memorandum.

II. THE DISTRICT COURT ERRED IN HOLDING THAT MISSISSIPPI'S VOTING CHANGES WERE EXEMPT FROM SECTION 5 PRECLEARANCE.

A. The Voting Changes Were Not Exempt from Coverage on the Ground That the Changes Merely Corrected a Misapplication of State Law.

The district court relied on the alternative theory, equally at odds with this Court's precedents and the language, purpose and structure of Section 5, that the procedures set forth in the February 10, 1995, memorandum, were outside the coverage of Section 5. The court ruled that the Mississippi Secretary of State was without authority, under State law, "to effectuate a change in the election laws contrary to [Mississippi's] legislative enactments," and that he therefore could not implement procedures permitting NVRA registrants to vote in local and state elections. J.S. App. 7a. The court reasoned from this that the State's February 10, 1995, memorandum instructing election officials to remove NVRA registrants from the rolls and to implement a system of dual registration and record-keeping was not a change requiring

preclearance, because the changes were made for the purpose of correcting a misapplication of state law. J.S. App. 8a.

The district court disregarded this Court's precedents in holding that changes in voting procedures are exempt from Section 5 coverage so long as the State is merely seeking to conform a set of practices to state law. That potential loophole in Section 5 coverage was closed in *Perkins v. Matthews*, 400 U.S. at 394-95. In *Perkins*, black voters sued to enjoin the City of Canton, Mississippi from implementing a change from a ward system to a system of at-large aldermanic elections. The City of Canton argued that a Section 5 submission was unnecessary because Canton's previous ward elections had been conducted contrary to a 1962 Mississippi statute requiring at-large aldermanic elections , and the change to at-large elections was therefore necessary to conform Canton's procedures to State law. This Court reversed the district court's judgment in favor of Canton, holding that the City's previous use of ward elections showed that "the procedure . . . *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards." *Perkins*, 400 U.S. at 395 [(quoting Section 5)]. A change from that procedure was therefore a change requiring preclearance under Section 5, regardless of the mandates of the 1962 Mississippi statute.

Under *Perkins*, therefore, when Mississippi officials decided to halt implementation of the unitary NVRA registration system under which thousands of voters were registered starting January 1, 1995, the State was required to submit for Section 5 preclearance the changes it wished to make altering its registration practices. Indeed, if the district court's ruling in this case were correct, the City of Canton could have easily evaded the holding in *Perkins*, and avoided submission of its voting changes, simply by asking the State to issue a

memorandum ordering it to "correct" its "misapplication of state law" by instituting at-large elections. *Cf.* J.S. App. 8a.

Perkins further held that the local district court had exceeded its jurisdiction in a Section 5 enforcement action by inquiring into the motives of the City of Canton in adopting the changes in question. The jurisdiction of a local three-judge district court in cases brought to enjoin use of an unprecleared voting change is "limited to the determination whether 'a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny.'" *Perkins*, 400 U.S. at 383, quoting *Allen*, 393 U.S. at 561. The City of Canton's desire to conform its practices to state law might have been relevant in determining the substantive question of whether Canton was entitled to preclearance for the change in voting procedures, but that question, the Court held, was reserved to either the District Court for the District of Columbia or the United States Attorney General. *Perkins*, 400 U.S. at 395 (the "bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide").[14]

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[14] As this Court recently explained in *Lopez v. Monterey County*, 1996 WL 637045, at *9:

> Congress designed the preclearance procedure "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *McDaniel*, 452 U.S., at 149. Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia. As we explained in *McDaniel*, "[b]ecause a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." *Id.* at 151 (footnote omitted).

Thus, Mississippi's reasons for implementing the voting changes described in the February 10, 1995, memorandum will become relevant only if and when the State seeks preclearance of those changes pursuant to Section 5.

This Court has consistently adhered to *Perkins*' holding that Section 5 addresses changes from election procedures "*in fact* in force or effect," *Perkins*, 400 U.S. at 395 (emphasis original), regardless of their legal status under state law. *City of Lockhart*, 460 U.S. at 133 ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect"); *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982).

In *Hathorn v. Lovorn*, a series of state court rulings had mandated changes in the election system for a school district in Winston County, Mississippi, and the final election plan ordered by the state Chancery Court incorporated a run-off requirement, in accordance with pre-existing Mississippi state law. The Chancery Court determined that this plan had to be submitted for Section 5 preclearance, and the United States Attorney General objected to the inclusion of the run-off requirement. After the Chancery Court ruled that its decree would have to comply with the Voting Rights Act, the Mississippi Supreme Court reversed, holding that Winston County must comply with the state-law run-off requirement in conducting its elections. 457 U.S. at 257-261. Although the primary issue addressed by this Court in reviewing the Mississippi Supreme Court's decision was whether the state court had jurisdiction to consider the requirements of Section 5 in fashioning its decree, this Court also took care to point out that "a state court decree directing compliance with a state election statute contemplates 'administ[ration]' of the state statute within the meaning of § 5." 457 U.S. at 265 n. 16. If a decree issued by a state court for the purpose of conforming an election system to existing

state law is subject to the Section 5 preclearance requirement, it follows that a directive issued by a state Assistant Attorney General for the asserted purpose of conforming an election system to existing state law -- such as the State's February 10, 1995, memorandum -- also is subject to the Section 5 preclearance requirement.

In any event, the district court's conclusion that the Secretary of State's actions were unratified and therefore not attributable to the state is incorrect, even if, contrary to *Perkins*, the question were relevant here. The Governor designated the Secretary of State as the chief election officer of the State for purposes of implementing the NVRA. J.A. 14. Moreover, the plan for implementing a unified NVRA registration system as of January 1, 1995, was not a secret confined to the Secretary of State's office. Instead, the Secretary of State's office developed that plan in conjunction with the State's NVRA Implementation Committee, which included the chairs of the election committees of the Mississippi House and Senate, a representative of the Mississippi Attorney General's office, legal counsel from the Governor's office, and representatives of many other state agencies, as well as the General Counsel to the Secretary of State, who was also the Assistant Attorney General for Elections. J.A. 77-78. Instructions for implementing this plan were conveyed to local election officials in numerous training sessions in 1994 at which the NVRA manual was distributed. The purpose of such training sessions was "to ensure that all officials are thoroughly prepared to implement the new programs and procedures beginning January 1, 1995." J.A. 22. Election officials actually registered thousands of voters under those procedures and added them to the rolls for all elections, federal, state and local, in early 1995. J.A. 114. Mississippi cannot, consistent with Section 5, pretend that none of this ever happened, and proceed at will to implement changes

that dramatically depart from these procedures, without submitting those changes for preclearance review.

The district court appeared to believe that actions taken by state election officials do not attain any official status for Section 5 purposes unless "ratified" by the state legislature, or perhaps by the Mississippi Governor and Attorney General. J.S. App. at 8a. That is at odds with the express language of Section 5, which encompasses not only enacted laws but any "standard, practice or procedure" with respect to voting, and specifically requires preclearance of any changes that covered jurisdictions "shall enact or seek to administer." 42 U.S.C. § 1973c. *Cf. Morse v. Republican Party of Virginia*, 116 S. Ct. at 1223 (Thomas, J., dissenting) ("When the legislature passes a law, *or an administrative agency issues a policy directive*, official action has unquestionably been taken in the name of the State. Accordingly, voting changes administered by such entities have been governed consistently by § 5") (emphasis added). If it were otherwise, states could evade the requirements of Section 5 at will simply by allowing administrative agencies to issue directives requiring voting changes, rather than involving the legislature or governor.

Further, the statutory policy of the State of Mississippi at all times relevant to this case was to have a unitary voter registration system, under which qualified voters, once registered, are eligible to vote in all elections. Miss. Code Ann. § 23-15-11 (1990). It is unexplained how the Secretary of State could be authorized to ignore this fundamental state policy in implementing the NVRA, if he was unauthorized to depart in the slightest from any other Mississippi law. Such difficulties support the wisdom of keeping questions of state law authority out of Section 5 enforcement actions such as this.

Finally, even if, contrary to *Perkins* and other decisions of this Court, the question of the Secretary of State's authority under Mississippi law were controlling, the district court's decision still would have to be reversed. The procedures set forth in the State's February 10, 1995, memorandum reflect changes from the procedures that were in place in Mississippi in December 1994, prior to the effective date of the NVRA, regardless of the legal status of the procedures the State used in early 1995. Mississippi was required to obtain preclearance for its new registration procedures at some point. Thus, if the Secretary of State's NVRA plan, and the Attorney General's subsequent preclearance decision, could be treated as nullities because the Secretary of State lacked authority for his actions, it would follow that Mississippi's current registration system is being implemented without preclearance, in violation of Section 5. Thus, the State's clear violation of Section 5 simply cannot be finessed by treating the Secretary of State's NVRA plan and its implementation in early 1995 as nullities, even if such treatment were otherwise consistent with settled law.

B. The Voting Changes Were Not Exempt from Coverage on the Ground That They Were Adopted in Response to Federal Law.

The district court's decision carved out a further unwarranted exception to Section 5 's preclearance requirement by accepting the State's argument that the voting changes instituted by the February 10, 1995, memorandum were exempt from Section 5 preclearance because they were adopted to comply with the NVRA.

> In short, it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the

> NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General. [J.S. App. 8a-9a.]

In so holding, the district court ignored the express language of the NVRA, which states that "neither the rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965," 42 U.S.C. § 1973gg-9(d)(1), and further provides that "[n]othing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act," 42 U.S.C. § 1973gg-9(d)(2). Congress rejected an amendment to the NVRA that would have exempted NVRA-related voting changes from the Section 5 preclearance requirement. HR Rep. No. 9, 103rd Cong., 1st Sess. 37 (1993).[15]

Even if Congress had not enacted an express requirement that states adhere to the Voting Rights Act when implementing the NVRA, application of this Court's settled precedent would compel the same conclusion. In *Allen v. State Bd.*, this Court directly addressed whether the preclearance requirement of Section 5 applied to a "bulletin issued by the Virginia Board of Elections . . . [in] an attempt to modify the provisions of § 24-252 of the Code of Virginia of 1950 . . ." so

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[15] The minority members of the Committee on House Administration unsuccessfully proposed an amendment "providing that mandates in the bill that are subject to pre-clearance for the nine southern states as required by the Voting Rights Act of 1965 be applied to all 50 states, or in the alternative eliminating the pre-clearance requirements of the Voting Rights Act for any new mandates required by the bill." H.R. Rep. No. 9, 103rd Cong., 1st Sess. 37 (1993).

as to assure compliance with the provisions of the Voting Rights Act of 1965. 393 U.S. at 552. The Board of Elections' bulletin provided that illiterate persons could receive assistance in casting write-in votes, thus adding to the conditions specified in state law under which assistance could be provided to voters. *Id.* at 570, 582. *Allen* held that the Virginia bulletin was a covered change, rejecting Virginia's argument "that § 5 [did] not apply to the regulation in their case, because that regulation was issued in an attempt to comply with the provisions of the Voting Rights Act." *Id.* at 565, n. 29. As the Court explained, "[t]o hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from §5 coverage -- even though it would have the effect of racial discrimination. It is precisely this situation [that] Congress sought to avoid in passing §5." *Id. See also id.* at 566 ("the legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way").

Similarly, this Court has ruled that voting changes made by covered jurisdictions in response to orders of federal courts instructing them to create a remedy for a district court's finding of a violation of the one-person, one-vote doctrine or the Voting Rights Act must be precleared pursuant to Section 5 before implementation. *McDaniel*, 452 U.S. at 145-153. Indeed, if the district court's theory in this case were correct, most redistricting plans would not be subject to the requirement of Section 5 preclearance, because such plans are usually enacted to comply with the one-person, one-vote requirements of the Fourteenth Amendment.

This Court has refused to create sweeping exceptions to the requirements of Section 5, holding, "[t]he prophylactic purposes of the § 5 remedy are achieved by automatically requiring 'review of *all* voting changes prior to implementation

by the covered jurisdictions.'" *McDaniel*, 452 U.S. at 151, *citing* S Rep No. 94-295, p. 15 (1975). That review must be conducted by the United States Attorney General or the District Court for the District of Columbia, not by the local three-judge district court, which had no jurisdiction to determine the motives for the voting changes initiated by the State's February 10, 1995, memorandum.

CONCLUSION

Because the changes set forth in the State's February 10, 1995, memorandum have not received the required preclearance under Section 5, this Court should reverse the judgment below and direct that an injunction be entered prohibiting further implementation of the unprecleared changes, including the holding of any further elections as to which registration has been conducted under unprecleared procedures. *Clark v. Roemer*, 500 U.S. at 655. Because registration itself cannot be halted without subverting the purposes both of Section 5 and the NVRA, the State should be directed to enroll all past and future NVRA registrants as voters entitled to vote in all elections, unless and until the State obtains preclearance for some other arrangement. *Cf. Clark*, 500 U.S. at 660 (district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions.") Other questions concerning appropriate relief, such as those relating to elections that have already been conducted based on voter registration under the unprecleared procedures, should be addressed by the district court in the first instance. *See NAACP v. Hampton County*, 470 U.S. at 182-183.

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No. 95-2031

In The

Supreme Court of the United States

October Term, 1996

THOMAS YOUNG, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The
United States District Court
For The Southern District Of Mississippi

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether the district court erred in ruling that the State of Mississippi had made no voting change requiring preclearance under Section 5 of the Voting Rights Act when it implemented the requirements of the National Voter Registration Act without changing State law.

2. Whether the term, "[w]henever a State . . . shall . . . seek to administer", as used in Section 5 of the Voting Rights Act, encompasses acts of mid-level bureaucrats when those acts are contrary to State law and do not represent changes which the State wishes, or intends, to implement.

PARTIES TO PROCEEDING BELOW

Parties to the proceeding in the district court were:

Plaintiffs/Appellants

1. Thomas J. Young,

2. Richard L. Gardner,

3. Eleanor Faye Smith,

4. Rims Barber,

Defendants/Appellees

5. Kirk Fordice, in his capacity as Governor of the State of Mississippi,

6. Mike Moore, in his capacity as Attorney General of the State of Mississippi,

7. Dick Molpus, in his official capacity as Secretary of State of the State of Mississippi,

8. Don Taylor, in his capacity as the Executive Director of the Mississippi Department of Human Services.

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STATEMENT OF THE CASE

This case presents a Section 5 Voting Rights Act challenge to the State of Mississippi's implementation of the mandates of the National Voter Registration Act of 1993, 42 U.S.C. §§1973gg, et seq. (NVRA). By its express terms the NVRA mandates only that States provide citizens certain opportunities to register to vote in *federal* elections. Nothing in the NVRA has anything to do with voter registration for *State* elections. The plaintiffs and the United States begin their Statements of the Case with the oxymoronic propositions that in implementing the requirements of the NVRA the State of Mississippi both changed its voter registration laws without preclearance and, at the same time, wrongfully implemented the NVRA without changing its State registration laws, resulting in the existence of a separate federal-only registration system under the NVRA.

In fact, the State simply did what the NVRA requires. It made voter registration for federal elections available at locations where citizens apply for drivers' licenses and at various other agencies where citizens apply for government benefits. As found by the three-judge court below, the State voter registration statutes establishing eligibility for inclusion on State voter rolls were not in fact changed by the Mississippi Legislature or by operation of the NVRA. As before implementation of the NVRA, in order to be universally registered to vote in Mississippi one must comply with the extremely accommodating requirements of Mississippi law. As contemplated by the NVRA, those registering pursuant to the

NVRA requirements are registered only for federal elections. The plaintiffs and *amici* incorrectly assert that this results in a dual registration system notwithstanding the fact that no one is *required* to register twice in order to be universally registered. Both before the implementation of the NVRA and presently, an individual need register only one time, under the provisions of Mississippi law, to be a registered voter for every election, local, state, or federal, conducted in that voter's jurisdiction.

A. Mississippi's Implementation of The NVRA.

The plaintiffs' theory of a voting rights violation arises from a set of peculiar circumstances surrounding the State's submission of certain administrative changes for Section 5 preclearance. The confusion was caused in equal parts by the U.S. Department of Justice and by an employee of the Mississippi Secretary of State's office.

The NVRA was adopted into law in 1993. During 1993, Mississippi began planning for its January 1, 1995, implementation of the requirements of the NVRA. On December 15, 1993, Governor Kirk Fordice issued an Executive Order creating a committee to plan for implementation, and naming the Mississippi Secretary of State as the official responsible for coordinating State efforts. Plf.Summ.Jud.Mot.Ex.1. The committee had the responsibility only to give advice and make proposals to State agencies which had the authority to do those things required to accomplish implementation of the NVRA, and to give advice and make proposals to the Mississippi Legislature should the Legislature decide to change the

already liberal Mississippi voter registration laws to conform to the requirements of the NVRA. During 1994, the committee held various meetings and generated plans and materials designed to make implementation go smoothly.

Proposed changes envisioned by the committee were of two basic types, administrative and legislative. Administrative changes were the sort that could be implemented by administrative fiat from the head of the affected State agency. The head of a particular State agency such as the Department of Human Services or the Department of Public Safety could simply decree that employees within his agency would make certain voter registration forms available under certain conditions to agency patrons. The decision to designate certain agencies, the process those agencies would follow, and the choice of NVRA forms those agencies would use were administrative changes affecting voting that arguably required Section 5 preclearance.

On the other hand, legislative changes were those necessary to change anything previously set in place by State statute. Things controlled by statute included the qualifications for enrollment on State voter rolls, purging requirements, and the form of the State registration application. By custom and practice, and generally by statute, legislative changes are submitted for preclearance by the Mississippi Attorney General. Legislative enactments consistently designate that office as the proper submitting authority.

From time to time an Assistant Secretary of State, Constance Slaughter-Harvey, made informational mailings

of committee material to officials with the U.S. Department of Justice. Her purpose in making these informational mailings was to keep federal officials apprised of the progress of Mississippi's plan for implementing the NVRA. On December 20, 1994, Dave Hunter, an official with the Department of Justice, suggested in a telephone conversation with an attorney with the Office of the Secretary of State that the matters previously outlined in informational mailings should be submitted for Section 5 preclearance. In response Ms. Slaughter-Harvey wrote the Justice Department on the same day, December 20, and requested simply that the Department consider all the prior informational mailings as one large undifferentiated Section 5 submission. J.A. 109.

The prior informational mailings that were redesignated as a submission included a draft of legislation that would be proposed in the upcoming 1995 legislative session scheduled to get underway in January 1995. J.A. 86 (partial reproduction). Section 22 of that draft legislation provided that the Mississippi Attorney General, not the Secretary of State, was designated as the official with authority and responsibility to submit the legislation for preclearance should the legislation be adopted. J.A., 103. No one in the Attorney General's office was aware of Ms. Slaughter-Harvey's December 20 letter.

The informational material sent by Ms. Slaughter-Harvey also included such things as a proposed designation of State agencies where NVRA applications would be distributed, the process those agencies would follow, and a new voter registration form that would replace the State's old form should the proposed legislation be

adopted in the form suggested in the draft legislation.[1] The Department of Justice understood perfectly well that changes to requirements imposed by State law, such as the qualifications to be enrolled on State voter rolls and changes to State voter registration forms, could not be accomplished without passage of the legislation that was to be proposed in the January session of the legislature.

The appellants contend that one of those prior informational mailings, a December 14, 1994, letter to the Department of Justice from Ms. Slaughter-Harvey, J.A. 107-108, set forth "practices that were to be implemented 'prior to the passage of state legislation' ". In fact, the letter states that the writer had originally planned to submit a preclearance package including Mississippi's plans for implementation of the NVRA only after the proposed legislation had passed, but at the request of a Justice Department official she was sending the plans "prior to the passage" of the proposed legislation. The appellants' contention that the December 14 letter amounts to an indication that changes requiring legislative action were being submitted for preclearance prior to legislative action being taken, Brief, at p. 9, materially misconstrues the letter.

In early January, 1995, the Mississippi Legislature convened and the proposed legislation was introduced. It

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[1] The "submission" also contained an NVRA information manual, model office procedures, updates, status reports, a summary of legislative efforts, reports of committee hearings, summaries of committee discussions, summaries of community outreach programs, and reports of training programs, Def.Summ.Judg.Mot.Ex."A".

died in committee on January 25, 1995. The Department of Justice, with full knowledge that the proposed legislative changes were dead, U.S. Brief, pp. 26-27, n. 14, and with the apparent intention of doing what it could to change Mississippi statutory law by its own administrative fiat, promptly precleared Ms. Slaughter-Harvey's submission on February 1, 1995. J.S. App. 15a. The Justice Department's letter of February 1, 1995, listed the matters precleared. J.S. App. 15a-19a. Included in the list are changes to the Mississippi statutory mail-in registration form and changes to the Mississippi statutory purge provision. Both of these "changes" were proposed in the failed legislation. Neither provision was in reality changed at all. The other changes precleared by the Department of Justice were administrative changes relating only to NVRA registration at State agencies. The Department of Justice then announced that the proposed legislative changes had, by virtue of the preclearance, been accomplished without legislative approval.

Nothing in the submission ever represented that the State had changed its registration requirements for State elections as set forth in applicable statutes. Nothing in the materials ever represented that changes in State law had been accomplished or that anything required to be done by State law could be changed without legislative action. To the contrary the material included an express statement that the purpose of the proposed legislative changes was to prevent a "dual" system of registration from occurring. J.A. 72.

As found by the district court, the Attorney General's preclearance was not a preclearance of any accomplished change in Mississippi registration statutes controlling

State registration or elections. The preclearance operated to preclear only those things which could be changed without legislation, i.e. the administrative changes which would occur at State agency offices. The appellants contend, however, that officials with the Secretary of State and the U.S. Justice Department both believed that the Legislature would enact reconciling legislation. The appellants also contend that the informational mailings, therefore, implied that the forms and procedures set forth in the submission would eventually apply to State registration as well as federal registration. The appellants and the United States further contend that since the Attorney General purported to preclear changes she believed were implied in the submission, or which she expected would occur in State requirements, those imagined changes in State requirements now exist and represent the extant precleared condition of Mississippi law.

In the latter part of 1994, Ms. Slaughter-Harvey, believing that State statutes would be changed, took it upon herself to verbally advise circuit clerks in attendance at a seminar to begin enrolling NVRA registrants on State voter rolls on January 1, 1995, notwithstanding the fact that the legislature would not even have convened by that date. No one with the Mississippi Attorney General's Office was aware that this advice had been given. No one with the State Attorney General's Office was even aware that Ms. Slaughter-Harvey's submission to the Department of Justice had been made. Contrary to the assertion made by the appellants that "effective January 1, 1995, Mississippi election officials began implementing the NVRA under a unitary system", only 31 of the 82 county circuit clerks followed Ms. Slaughter-

Harvey's advice, J.A. 161-163, and only then for the short time from January 1, 1995, until correct advice was sent them on February 10, 1995. There is nothing in the record to support the appellants' claim that the approximately 4,000 persons who registered statewide under NVRA during the period between January 1 and February 10 were placed on State voter rolls. The record does not indicate how many NVRA registrants were actually, and temporarily, placed on State voter rolls in those 31 counties that followed the mistaken verbal advice to enroll NVRA registrants on State voter rolls. Obviously, some portion of the 4,000 statewide NVRA registrants were residents of the 51 counties where no NVRA registrants were placed on voter rolls.

After the proposed legislation died on January 25, 1995, concerned circuit clerks began calling the State Attorney General's Office inquiring about the propriety of enrolling NVRA registrants on State voter rolls. On February 10, 1995, an attorney with the office of the Secretary of State and an attorney with the Mississippi Attorney General's Office dispelled the confusion caused by Ms. Slaughter-Harvey's verbal advice by writing a memorandum to circuit clerks and chairmen of county election commissions across the State advising that the proposed legislation had died in committee and advising that Mississippi law for State and local elections remained unchanged. J.S. App. 20a. Contrary to appellants' assertion, Brief, pp. 14-15, the February 10 memorandum was not a directive, did not implement a dual registration system, and did not "instruct" circuit clerks to "resume" state law purges. Neither the Assistant Attorney General nor the attorney with the Secretary of

State who co-authored the memorandum had any authority to dictate anything to the circuit clerks.

The appellants contend that this memorandum effectively enacted an unprecleared "change" in State law from the pretended "changes" in State registration statutes which were "precleared" on February 1, 1995. In reality, the February 10 memorandum merely states the obvious point that there has been no change in State law. The appellants' Section 5 theory of liability is predicated entirely on the erroneous proposition that some change in State law was accomplished by the informational mailings and the "preclearance" that followed, and that the February 10 memorandum changed the law back to its previous condition without benefit of additional preclearance.

B. Mississippi's Voter Registration System.

As pointed out by the appellants, at one time the State did have a true dual registration system whereunder residents of municipalities were *required* to register twice in order to be eligible to vote in local and state elections. The first registration had to be with the county registrar. In order to vote in municipal elections voters then had to register with the municipal registrar. This condition was described in *Miss. State Operation PUSH v. Allain*, 674 F.Supp. 1245 (S.D. Miss. 1987). After the district court decision in *PUSH*, the State responded legislatively by first adopting the district court's remedial suggestions, 717 F.Supp. 1189 (N.D. Miss 1990), affd., 932 F.2d 400 (5th Cir. 1991), then further liberalized its voter registration system by passing a mail-in voter registration

system. Accordingly, the State has gone beyond the measures needed to address the concerns set out by the district court in the initial *PUSH* decision, and it has thoroughly revamped its voter registration requirements to expand voter registration opportunities, *see generally*, 788 F.Supp. at 1408-1412 (summarizing *PUSH* litigation and expansion of voter registration opportunities).

Before the enactment of the NVRA and subsequently, the State of Mississippi has operated one of the most accommodating voter registration systems in the nation. Pursuant to Miss. Code Ann. §23-15-35, a qualified individual may register one time, pursuant to State requirements, and be eligible for every local, state, or federal election. This was accomplished by cross-deputizing county and city clerks for purposes of registration. There is no requirement that anyone register more than one time in order to be fully registered to vote. Because of this section, an individual may complete his all-purpose registration at the office of his circuit clerk or at the office of the municipal clerk of his city, town, or village. Pursuant to Miss. Code Ann. §23-15-47, that individual is not even required to travel to any office in order to register. He may simply pick up the telephone or mail a letter to any office of any registrar, and request a voter registration form. He can then mail the form back to the office of his choosing and be fully registered for all elections. The plaintiffs misconstrue the universal registration system and state that prior to NVRA all registrants were universally registered, and that after NVRA this is no longer so. In reality, both before and after NVRA all persons *registering pursuant to State statutory requirements* were and are

universally registered. No change in this system was caused by the implementation of the NVRA.

By virtue of the mail-in provisions, anyone who wants to assist in voter registration drives is empowered to get a stack of mail-in forms and distribute them freely and act as a witness, in the county of his residence, for the potential registrants. The previous requirement, formerly set forth in §23-15-47, that only the county registrar or his deputy could perform this service has been abolished. Pursuant to §23-15-47 the Office of the Secretary of State is required to have mail-in registration forms available in bulk and to distribute them in bulk to any person or organization requesting them. The same forms must be provided in bulk without charge to the Commissioner of Public Safety for distribution to each drivers' license examining station, and made available in bulk to all public schools, any private school that requests them, and all public libraries.

In the event any completed mail-in form is in any way insufficient, the county registrar is required by §23-15-47 to contact the individual and get the necessary curative information and register the individual if he is eligible. If the registrar is unable to cure the defect the registrar must give the applicant written notice of rejection with the reason for the rejection and inform the applicant of his right to attempt to register in person or to reapply by mail. Section 23-15-37 requires extended office hours for the office of the county registrar immediately prior to the registration deadline for county and state elections, and for extended office hours for the city registrar immediately prior to the registration deadlines for city elections. The same statute empowers the county

registrar to visit any location in his county for the purpose of registering voters not less than 30 days before an election.

Section 23-15-37 requires the registrar or his deputy to visit, upon request, any disabled person and provide that person with an application for registration. All the disabled person need do is execute the application in the presence of the visiting registrar or his deputy.

As stated earlier, the Mississippi system is among the most accommodating systems in the nation. All of these code sections have been precleared by the Attorney General and were in effect prior to passage of the NVRA. The system described above is unchanged by anything contained in the NVRA or the State's implementation of the NVRA. The State administers the same system of voter registration today that it administered prior to implementation of the NVRA on January 1, 1995. As will be shown below, the NVRA merely added an additional method for registration for *federal* elections. There exists no dual registration system of the sort addressed in *PUSH*. There is no *requirement* that anyone register twice in order to be universally registered. Mississippi has not created a "dual" system of registration. With implementation of the NVRA a separate system of registration for federal elections exists, but it was the United States, not Mississippi, which created the additional method of registration. Mississippi made no change requiring preclearance other than the administrative changes described above which have been precleared.

C. Proceedings In The Court Below.

The plaintiffs' Complaint was filed on April 25, 1995. A three-judge court was promptly convened and cross-motions for partial summary judgment were filed on the Section 5 issue. The court granted the defendants' motion in an Opinion issued on July 24, 1995. J.S. App. 1a. Final judgment was entered for the defendants on February 9, 1996. J.S. App. 10a. Contrary to appellants' assertion, a separate claim for relief alleging insufficient compliance with the requirements of the NVRA was not "voluntarily resolved" among the parties. The plaintiffs, apparently realizing that the claim was meritless, simply dismissed that separate count of their Complaint.

The three-judge district court ruled that the administrative changes made by Mississippi in implementing the NVRA had received preclearance from the Attorney General. The court also ruled that no other changes had occurred. The court ruled that the unauthorized actions of Ms. Slaughter-Harvey and the 31 circuit clerks who followed her advice to enroll NVRA registrants on State voter rolls amounted to nothing more than a "misapplication" of State law. The Court recognized that the errant advice of an Assistant Secretary of State and the temporary actions of some circuit clerks did not in fact represent State choice and did not amount to a State initiated change affecting voting. J.S. App. 7a-8a.

Contrary to the interpretation of the appellants and *amici* the district court did not rule, and the defendants do not contend, that the State could initiate changes without submitting them for Section 5 scrutiny merely

because such changes might be a part of an NVRA implementation plan. The district court did rule, and the defendants do contend, that conditions initiated and required by *federal* law are not within the scope of Section 5 coverage. The court ruled that the separate federal-only registration system was a condition initiated and required by federal rather than State law, and that the fact that a separate system of federal-only registration now exists need not be submitted for preclearance. J.S. App. 8a-9a.

SUMMARY OF ARGUMENT

1. The plaintiffs' entire argument is based on two false notions. The first is the contention that Ms. Slaughter-Harvey's submission together with the Justice Department's letter of preclearance served to change Mississippi statutory law regarding registration for State elections. The second is the contention that the district court ruled that Mississippi, itself, could initiate changes without the necessity of obtaining Section 5 preclearance so long as any such changes were part of a plan to implement the NVRA. Neither contention is correct and the plaintiffs' brief is dedicated to a factual scenario that does not exist.

2. Actions of errant or rogue State officials which amount to a misapplication of State law, and which do not represent policy choices the State wishes, or intends, to implement, do not amount to changes a State "seek[s] to administer" within the meaning of Section 5 of the Voting Rights Act, *see, United States v. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). Other remedies exist for correcting such actions of errant or rogue officials

without expanding the reach of Section 5 beyond its intended or permissible limits.

ARGUMENT

A. No Reconciliation Of State Law With NVRA Provisions Was Required Or Accomplished.

There are two broad precepts that underlie the analysis of the appellants' theory of Section 5 liability. First, States are free to maintain requirements for voter registration for State elections separate from and different from those requirements imposed by the federal government for federal elections, *see, Oregon v. Mitchell*, 400 U.S. 112 (1970) (States free to maintain different voting age requirement than that required for federal elections by the federal government). Second, only State-initiated changes in voting standards, practices, or procedures are required to be submitted for preclearance under Section 5 of the Voting Rights Act, *see, Beer v. United States*, 425 U.S. 130 (1976).

The NVRA is federal legislation, and as such does not require preclearance to be effective. However, as pointed out in the Statement of the Case, there are certain choices that the State made in implementing the NVRA which arguably amounted to changes affecting voting and required Section 5 preclearance. The State's designation of agencies to be utilized in implementation, the procedures to be utilized by those agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms may have required Section 5 preclearance. The package of materials submitted

to the Attorney General by Ms. Slaughter-Harvey outlined the State's proposals for administratively implementing these NVRA choices and procedures. These administrative changes were precleared on February 1, 1995. Beyond this there were no State-initiated changes in standards, practices, or procedures which needed preclearance consideration. All the other items contained in the informational mailings/submission, including the proposed legislation, were superfluous for Section 5 purposes.

The major pretense of the appellants' position is that changes to the State's statutory registration requirements were accomplished. An example of this is found in the Attorney General's preclearance letter of February 1. J.S. App. 15a. The Attorney General expressed no objection to two "changes" which could only have been accomplished through legislative action. The first item was the elimination of the attesting witness requirement to the State mail-in registration form. The second item dealt with purging requirements. The proposed legislation would have eliminated the State provision allowing the purging of the names of any voters who had not voted for four years. Neither of these items could be changed administratively. Each would have required legislative action. In purporting to preclear these items as part of the *proposed* legislation the Attorney General violated a Department of Justice regulation, 28 C.F.R. §51.22, which expressly provides that "[t]he Attorney General will not consider on the merits: (a) any proposal for a change affecting voting submitted prior to final enactment or administrative decision".

More generally, the appellants posit that the entire submission was designed to preclear a single structure for reconciled registration for State and NVRA purposes. In fact, the idea of reconciled registration was never adopted by the State and could not, therefore, have been submitted by any State official or precleared by the Attorney General. The appellants' theory is that a reconciled State voter registration system was submitted and precleared. They then contend that the February 10 memorandum changed the requirements back to those requirements found all along in the Mississippi Code. In the appellants' view the "second" change created a dual registration system and has not been precleared. The District Court quite correctly made the factual finding that State law never changed.

B. Unauthorized And Unratified Acts Of A State Official Do Not Constitute A Change In State Law.

The appellants contend that the erroneous verbal advice given by Ms. Slaughter-Harvey regarding the placing of NVRA registrants on State voter rolls, and the fact that some circuit clerks followed that advice for a period of a few weeks, established a benchmark for measuring retrogression, notwithstanding the fact that the mistake was temporary, contrary to State law, and was rectified by the Mississippi Attorney General as soon as it came to his attention. The plaintiffs' contention is built on several false premises.

The appellants begin with the mistaken notion that the Governor's Executive Order 739 bestowed the Secretary of State with greater authority than was actually the case. The appellants refer to the Secretary of State, variously, as the chief election officer for purposes of *implementing* the NVRA, Brief, at 39, or the chief election officer for purposes of compliance with the NVRA, Brief, at 7. In fact, "compliance official" was merely the *title* given the Secretary of State. The extent of his responsibility and authority was clearly defined in the Executive Order as "the chief state election official, who shall be responsible for *coordination of state responsibilities* under the Act." (emphasis added). (Plf.Summ.Jud.Ex.1) This definition and limitation of responsibility and authority is prescribed and required by 42 U.S.C. §1973gg-8.

Clearly, the executive order did not designate the Secretary of State as an election czar with the power to supplant the legislature with regard to matters relating to elections, nor did it, or could it, give the Secretary of State the power to dictate changes in State registration or purging requirements. The appellants do not attempt to explain how such a transfer of power could be accomplished under State law. They also do not seem concerned that such new authority relating to elections would, itself, require preclearance before such new authority could be exercised. The appellants understandably try to elevate the role of the Secretary of State to bolster the false notion that actions of his assistant, Ms. Slaughter-Harvey, represent the actions of the State of Mississippi as a body politic and that the Assistant Secretary of State had

authority to submit matters which would change State law.[2]

The appellants and the United States attempt to bolster the argument that the mistakes of Ms. Slaughter-Harvey and the 31 circuit clerks were State practices by asserting that Ms. Slaughter-Harvey's advice to the circuit clerks was an "instruction" or a "directive" to "subordinate officials". The actual communication to the circuit clerks was verbal. No official opinion was delivered by the Office of The Secretary of State, and no formal regulation was adopted and filed. No transcription or other reproduction of the actual communication has been presented in this proceeding. Whatever the text of the communication, Ms. Slaughter-Harvey simply did not have the authority to dictate anything to the circuit clerks. She could offer her opinion, but no more. Her mistaken verbal advice does not rise to the level of "an administrative agency issu[ing] a policy directive" as contemplated by Justice Thomas' dissent in *Morse v. Republican Party of Virginia*, ___ U.S. ___, 116 S.Ct. 1186, 1223-1224 (1996). A February 24, 1995, memorandum from Ms. Slaughter-Harvey to agency representatives characterizes prior communications from the State Attorney General's Office and the Secretary of State's Office to circuit clerks as having contained merely "recommendations" and "advice" for circuit clerks. J.A. 114-116.

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[2] As set forth previously, the notion that the Assistant Secretary of State had authority to submit proposed changes to State law is refuted by the proposed legislation itself. Section 22 of the proposed legislation expressly directs that the Mississippi Attorney General would make the necessary submission if the legislation were adopted. J.A. 103.

In any event, circuit clerks are not "subordinate officials" to the Secretary of State or Ms. Slaughter-Harvey. Pursuant to Article 6, §168 of the Mississippi Constitution, and Miss. Code Ann. §§9-7-121, *et seq.*, circuit clerks are independent constitutional county officials answerable only to county voters.[3] The fact that only 31 of the State's 82 circuit clerks followed the advice, J.A. 161-163, demonstrates clearly that the circuit clerks were not subordinate officials given their marching orders verbally by an Assistant Secretary of State.

The appellants contend that a benchmark was established notwithstanding the temporary, illegal, and sporadic nature of the "practice" of placing NVRA registrants on state voter rolls. The appellants rely primarily on *Perkins v. Matthews*, 400 U.S. 370 (1971) in support of this position. In *Perkins* the City of Canton chose, by normal city council practice, to elect its aldermen by wards. State law at the time required at-large elections and did not allow the ward selection method adopted by the city. The city operated under its ward system for a number of years. Later the city attempted to return to at-large elections, citing State law as the reason.

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[3] The appellants and the United States also argue that different circuit clerks made different decisions about whether and how to contact NVRA registrants to advise them of their federal-only status. They argue that these decisions represent changes that have not been precleared. Regardless of the merit of this contention, the circuit clerks are local officials not under the control of these defendants. To the extent, if any, that those activities need preclearance, any submissions would be made by the local officials involved. The Section 5 status of those local matters does not affect this proceeding.

In a resulting Section 5 challenge it was determined that use of the ward system established a benchmark regardless of the requirements of State law, and that a return to an at-large system would be retrogressive. *Perkins* does not control here. In *Perkins* the City of Canton acted *qua* City of Canton. The body politic made its choice and implemented that choice as the choice of the City. There was no question of whether the original change to a ward system resulted from the actions of an errant or rogue official. The action may have been insupportable under Mississippi law, but it was clearly the conscious choice of the city itself. This Court correctly found that the political entity had consciously established a practice that served as a benchmark.

In the present case the body politic is the State of Mississippi. The State has not adopted or implemented a practice of placing NVRA registrants on State voter rolls. The political entity, the State, consciously rejected the proposition through its legislative process when the legislature rejected the proposed legislation. Neither the mistaken advice of Ms. Slaughter-Harvey nor the temporary following of that advice by 31 of the State's 82 circuit clerks represented a policy choice of the State.

The appellants have also cited *City of Lockhart v. United States*, 460 U.S. 125 (1983), in support of their theory that a benchmark was established between January 1 and February 10, and that the February 10 memorandum changed State law and amounts to a retrogression. *Lockhart* presents a circumstance which, in principle, is indistinguishable from *Perkins*. The City of Lockhart, Texas, acting as a political entity, changed its form of government in a manner which may have been

contrary to Texas law. A subsequent attempt to make another change to a different form resulted in the same ruling as was made in *Perkins* for the same reason. The language quoted by appellants and the United States merely reflects the rule in *Perkins*. The Court's use of the words "without regard for the legality under state law of the practices already in effect", merely reflects an ambiguity in Texas law regarding which statutes applied to this particular city.

A much more analogous case is *United States v. Saint Landry Parish School*, 601 F.2d 859 (5th Cir. 1971). There, three poll commissioners engaged in a pattern of buying votes. The poll commissioners would enter the polling booths with voters and cast the voters' ballot in the manner of the poll commissioners' choosing. The voters would then receive payment. The United States filed suit claiming that this practice was "an unapproved change in the state's procedure for assisting voters", *id*, at 861. The Court found that the practice did not constitute the action of the covered political entity, but, rather, was merely the action of errant officials. The Court stated clearly that

> [a]lthough the actions of these poll commissioners could possibly be viewed as a change in voting procedures within the meaning of §5, we conclude that these actions do not constitute a change that the state *has enacted or sought to administer* within the meaning of that section.
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> We do not dispute that the actions of the three poll commissioner constitute actions of the state for certain purposes. (reference omitted) But one would not normally conclude that a state "enacts or administers" a new voting procedure every time a state official deviates from

> the state's required procedures. The common sense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned, and we think "shall seek to . . . administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing body. (underlined emphasis added; italicized emphasis supplied), *id.* at 864

Neither the State nor any State governing body enacted, administered, or implicitly approved the errant advice given by Ms. Slaughter-Harvey. The factual scenario in *Saint Landry Parish* is clearly closer to the facts of the present case. While the Office of the Secretary of State has a role to play in administering the State's election machinery, the particular statutory provisions at issue were not ambiguous and left no room for discretionary interpretation by the Secretary of State. The actions of Ms. Slaughter-Harvey cannot be said to amount to a policy choice of the Secretary of State much less the State of Mississippi. An attorney with the Secretary of State's Office joined the February 10 repudiation of her verbal advice. The verbal advice given by her was simply wrong and did not represent any policy. It represented nothing but wishful thinking and poor judgment.

As stated earlier, the Secretary of State was granted no extraordinary power or authority relating to elections by reason of Executive Order 739. The actions of the Assistant Secretary of State were those of a mid-level functionary who incorrectly anticipated that the Mississippi Legislature would adopt legislative changes in the State's voting requirements. The rulings in *Perkins* and

Lockhart are inapposite. Here, the body politic has not made a change with regard to State registration procedures. No benchmark was established by the erroneous and temporary enrolling of NVRA registrants on state voter rolls in 31 of the 82 counties. The February 10 memorandum did not change State procedure regarding State registration. The February 10 memorandum is not a "change" within the meaning of section 5 and does not constitute retrogression. As stated in *Saint Landry Parish*, "[s]urely Congress did not intend the Attorney General and the district court for the District of Columbia to waste their time considering voting procedures that a state does not wish to enact or administer." *id.*, at 864.

It is probably futile to attempt to formulate a test that will apply in all scenarios for determining whether activities of a State employee represent actions of a State for purposes of Section 5 coverage. This Court has not before had a case that squarely presented the issue. The reasoning of the Fifth Circuit in *Saint Landry Parish* is clearly correct and should be adopted by this Court. This is especially so where, as here, the actions are clearly contrary to established law, are not widely followed and even then only for a short time, and are promptly corrected when brought to the attention of more responsible State officials. Actions of errant or rogue officials, even in conjunction with actions of officials in the Justice Department, cannot operate to change State law or set Section 5 benchmarks. Any other determination would be an open invitation to collusion, and would be contrary to the accepted procedures of seeking and obtaining Section 5 preclearance.

There are other policy reasons for refusing to assign benchmark status to acts of errant or rogue officials. Garden variety election challenges prosecuted by disappointed office seekers routinely contain Section 5 counts alleging that some irregularity in the election represented a "change" for which preclearance had not been obtained. The courts that consider these challenges generally discount the Section 5 component of such challenges on the basis that such irregularities represent errors rather than chosen policy, *see generally, Miller v. Daniels*, 509 F.Supp. 400, 406-407 (S.D.N.Y. 1981) (actions of officials contrary to precleared law are not changes the jurisdiction "seeks to administer"); *Montgomery v. Leflore County Republican Executive Committee*, 776 F.Supp. 1142, 1145 (N.D. Miss. 1991) (illegal acts of officials do not implicate Section 5); *Citizens' Right To Vote v. Morgan*, 916 F.Supp. 601 (S.D.Miss. 1996) (election activities by officials in their individual capacities are not covered activities); *Beatty v. Esposito*, 439 F.Supp. 830, 832 (E.D.N.Y. 1977) (episodic removal of election inspector by county official is not an "enactment" covered by Section 5).

Errors can never be anticipated and submitted for preclearance, but if benchmark status is accorded Ms. Slaughter-Harvey's actions, covered jurisdictions will be forced to make after-the-fact submissions of such errors and irregularities in an effort to defend against ordinary election challenges. Routine elections will be plagued with disruptions, uncertainty, and unnecessary costs. There is no justification for extending Section 5 beyond its intended scope. As explained in *Saint Landry Parish*, section 5 does not apply to "every artifact of political manipulation. Section 5 has its own political cosmos, but

it does not possess a universality with respect to every electoral aberration." *Saint Landry Parish,* at 865.

C. Implementing The NVRA As Written Does Not Amount To A "Choice" Requiring Preclearance.

In its brief the United States begins with a dramatically incorrect and unsupported proposition. The United States recognizes, as it must, that the NVRA applies to federal elections only and the Act does not require the States to reconcile their State requirements with the NVRA. Accordingly, a State could fulfill its NVRA responsibilities simply by having its agencies make proper registration forms available under proper circumstances and carrying NVRA registrants on voter rolls as registrants eligible to vote in federal elections. This, along with purging requirements peculiar to those registrants, is all that the federal law requires. The United States contends, however, that simply doing what federal law requires amounts to a "choice" that requires preclearance. The United States asserts that by doing the things required by the NVRA the State has "chosen" not to do more. Specifically, the State has "chosen" not to reconcile State requirements with the NVRA. The United States contends that this "choice" is one which must be approved by federal authority before it can be effective if the jurisdiction is covered by Section 5.

In the first place, it is changes, not choices, that are within the scope of Section 5 and need to be precleared. Choices may amount to a decision to make a change, but choices may also amount to a decision to make no

change. If implemented, the plaintiffs' theory of Section 5 coverage would enable the Department of Justice to require any existing voting practice to be submitted for preclearance on the proposition that the "choice" to maintain the practice without change amounts to a Section 5 violation. The Constitutional guarantee that States have the power to establish voting requirements different from those set by the federal government, as explained in *Oregon v. Mitchell, supra*, would cease to exist for States covered by Section 5. The legality of *existing* laws or practices relating to voting can be tested by Section 2 of the Voting Rights Act, or by other challenges based on other State or federal authority. It is not the office of Section 5 to serve as a mechanism to challenge existing practices which have not been changed. This appeal does not present a challenge based on Section 2 or any authority other than Section 5. The plaintiffs have set forth no principled reason, or authority, to expand Section 5 coverage in the manner sought.

Assuming, safely, that the United States would consider that Mississippi's "choice" not to amend State voter requirements amounts to a State implemented retrogressive dual registration system,[4] it is a virtual certainty that

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[4] Implementation of the NVRA as a federal-only system does not, of course, amount to retrogression. The effect of the implementation will be to cause a net increase in the total number of people registered to vote. The number registered to vote in federal elections will increase. The number of people registered to vote in State elections will not be decreased. This is not a condition of retrogression under any definition. *cf., Miller v. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762, 784 (1995) (ameliorative change, even if less than optimum, cannot constitute

a covered jurisdiction such as Mississippi could never "choose" to do less than conform its State laws to the NVRA. The effect of this would be, of course, to cede complete authority over State registration laws to the federal government. Covered jurisdictions could not "opt out" and decouple State registration requirements from NVRA requirements without getting preclearance. Succeeding Congresses could amend and enlarge covered jurisdictions' NVRA requirements without regard to local concerns or needs. The United States offers no hint of authority contained in the NVRA, the Voting Rights Act, or elsewhere to support this extreme position.

This approach of bootstrapping Section 5 and the NVRA in order to advance a policy of forcing changes to State registration was implicitly rejected recently in *Miller v. Johnson*, 515 U.S. ___, 132 L.Ed.2d 762 (1995). In *Miller* this Court held squarely that the office of Section 5 is only to prevent retrogression in Black voting strength. The Court held that the United States' policy of using Section 5 to advance a Black-maximization agenda with regard to redistricting was contrary to the true office of Section 5 which is only to prevent retrogression, *id.*, at 786. The ruling in *Miller* casts considerable additional doubt on the legitimacy of the United States' effort here. Implementation of the NVRA as a separate method of registration, to exist side by side with existing State methods of registration, is contemplated by the NVRA, *see, Association of Community Organizations For Reform Now (ACORN) v. Edgar*, 880 F.Supp. 1215 (N.D. Il. 1995) (States free to

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retrogression); *Beer v. United States*, 425 U.S. 130, 141 (1976) (same).

implement NVRA on federal-only basis). Section 5, as construed in *Miller*, cannot be used to expand, or maximize, the dictates of the NVRA so as to force States covered by Section 5 to amend their registration statutes to conform to the requirements of the NVRA.

Both the United States and the appellants assert that the Attorney General was somehow misled regarding what was or was not being submitted for preclearance. This assertion borders on bad faith, and is totally unsupported in the record. The United States simply cannot make a good faith assertion that it did not understand that changes in State laws regarding State registration were dependent on passage of the proposed legislative package. The material submitted by the Assistant Secretary of State included a July 1994 Status Report which pointed out that the proposed "new legislation was to establish a unitary system 'to avoid a dual registration system.' " J.A. 72.

Accordingly, the appellants' contention that the Attorney General was never expressly put on notice that proposed changes in State registration procedures were dependent on passage of the proposed legislation is demonstrably incorrect. If the Attorney General truly needed a picture drawn, it was drawn by this language and the inclusion of the proposed legislation itself.[5] The Attorney General made a knowing choice to preclear

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[5] The comprehensive changes in the proposed legislation, and the necessity of legislative passage, were prominent elements in the material sent to the Justice Department. The appellants' characterization of these matters as a "buried nugget", Brief, at p. 32, is strained.

administrative changes after she knew the proposed legislation had been defeated. That choice was made in order to construct the argument advanced in this litigation that a benchmark was established by virtue of the action of the Department of Justice.

The appellants also contend that the failure of the proposed legislation rendered the submission inadequate since the submission did not indicate what would happen should the legislation be defeated. The appellants argue that the submission was ambiguous on the question, and that such ambiguity should be resolved against the State. The appellants cite *Clark v. Roemer*, 500 U.S. 646 (1991) for this general proposition. In reality there is nothing ambiguous about what happens when proposed legislation designed to make statutory changes fails. The changes simply, and unambiguously, do not occur. Here the Attorney General made a conscious decision to participate in the creation of a pretended ambiguity and now attempts to use this pretended ambiguity as a tool to help implement her misguided policy choice. Nothing in *Clark* supports the notion that such "ambiguity" should be resolved against the State. The reality is that the Justice Department liked what it saw in the amalgamated mass of materials proffered to it as a submission. The Attorney General seized what she considered to be an opportunity to force a change in the State's registration laws and issued her preclearance letter. Her decision was clearly calculated. She should not be allowed to disavow that decision now.

The appellants also argue that the district court erroneously ruled that the Attorney General "implicitly precleared" a federal-only NVRA implementation plan. The

appellants cite *McCain v. Lybrand*, 465 U.S. 236, 249 (1984) and *Clark v. Roemer*, 500 U.S. 646 (1991) for the proposition that preclearance by implication is disallowed. In the first place, *McCain* and *Clark* deal with changes made but not identified, not changes imagined but not made. In any event, the district court did not rule that anything happened by reason of any implication. It merely noted that the Attorney General would have had to have violated her own regulation, 28 C.F.R. §51.22, to preclear legislative changes that had not yet occurred. J.S. App. 7a-8a. The district court concluded that the Attorney General did not violate this regulation, and did not mean to preclear legislative changes, but that, instead, the only changes she meant to preclear were the administrative changes that were properly before her. By contrast, it is the United States which now argues that the preclearance was granted on the basis of an implication. U.S. Brief, at p. 26. It argues that it perceived the implication that State statutes were somehow going to be overcome solely by reason of the submission and the act of preclearance. If anything here is contrary to *McCain* and *Clark*, it is the United States' theory, not the district court's ruling.

In her eagerness to attempt to establish a benchmark by issuing the preclearance letter the Attorney General disregarded almost every regulation governing the content of Section 5 submissions. The Attorney General simply read inferences that suited her into the material sent her. 28 C.F.R. §51.27 lists certain requirements for the contents of proper submissions. None of these requirements was enforced. Some of the requirements such as subparts (c) and (h) respectively require specific statements regarding changes between the prior law and the

newly enacted law, and statements regarding the jurisdictional basis and procedures for the change. 28 C.F.R. §51.37 provides that the Attorney General may request additional information regarding the actual effect of any submitted change. If there was truly any doubt, the Attorney General should simply have asked Ms. Slaughter-Harvey what the effect of the defeat of the legislative package would have been. If the Justice Department had required a proper submission restricted only to *completed* changes as required by 28 C.F.R. §51.22, it could not today pretend that ambiguities existed.

D. The District Court Correctly Determined That The Existence Of A Separate, Federal-Only, Registration System Does Not Require Preclearance.

The appellants and *amici* misconstrue the district court's ruling regarding the necessity of seeking Section 5 preclearance for changes caused by federal law. The appellants and *amici* contend that the district court ruled that changes in State law are excused the necessity of preclearance so long as those changes are part of a plan to implement a federal directive. Brief, at p. 41; U.S. Brief at p. 22. This is simply not what the court ruled. The district court ruled, correctly, that no changes in State registration requirements had occurred. The court, having ruled that no changes to State requirements occurred, never so much as addressed the issue stated by the appellants.

What the court did rule was simply that the fact that a separate system for registering federal voters now exists is not, itself, a condition that needs preclearance.

This condition is brought about by federal law. The State of Mississippi is the covered jurisdiction, not the United States. Changes made by the United States are not subject to preclearance. If the State had adopted changes in its State voting requirements, those changes would have been subject to preclearance even though any such changes would have been designed as part of an overall package to implement federal legislation. The district court did not hold otherwise and the defendants do not contend otherwise. Nothing changes the fact, however, that, with an exception relating to changing the mail-in registration deadline from 60 to 30 days before an election, the State requirements exist today precisely as they existed before the Congress adopted the NVRA.[6]

CONCLUSION

The District Court was correct in its ruling that the administrative changes made by the State have been precleared, and that no change in State statutory requirements has occurred. Accordingly, the district court was correct in ruling that all covered changes had been precleared and that no further preclearance is necessary to the enforcement of the State's implementation of the NVRA. The sum total of all that has transpired is that no changes have occurred in State law and the NVRA has been implemented precisely as contemplated by the Congress. The simple fact that the poor judgment of a mid-

[6] That deadline was changed in the 1994 legislative session and was precleared by the Attorney General well before the events leading to this action occurred.

level State employee caused some confusion in the process is meaningless. The principles of federalism are tested severely enough by the requirement that changes which a State genuinely wants to implement must be submitted to federal authority for approval. The notion that the device of preclearance can be utilized to impose on a State changes it does not want should be emphatically rejected by this Court. The judgment of the District Court should be affirmed in its entirety.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, *et al.*,

Appellants,

v.

KIRK FORDICE, *et al.*,

Appellees.

On Appeal From The United States District Court
For The Southern District of Mississippi

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REPLY BRIEF FOR APPELLANTS

INTRODUCTION

The facts establishing Mississippi's violation of Section 5 of the Voting Rights Act are straightforward. The State's original plan for implementing the NVRA, set forth primarily in a November 1994 NVRA implementation manual, was submitted for Section 5 preclearance, but the State's subsequent plan, established through the State's February 10, 1995, memorandum, was not submitted for preclearance. Mississippi currently is not implementing the NVRA procedures for which it obtained Section 5 preclearance, and Mississippi did not obtain preclearance for the procedures it is now implementing. The State's responsibility, contrary to appellees' theory, is not to search for a scapegoat for the current state of affairs, but to submit for Section 5 preclearance the procedures the State

decided to implement following the tabling of proposed legislation by a state senate committee on January 25, 1995. None of the appellees' arguments overcome the conclusion, mandated by the express language of Section 5 and this Court's decisions, that the State's administration of unprecleared voter registration procedures violates Section 5.

I. MISSISSIPPI HAS NOT RECEIVED PRECLEARANCE FOR ITS CURRENT REGISTRATION PRACTICES.

Appellees' brief confirms key facts establishing the State's violation of Section 5. Appellees now agree that "[t]he State's designation of agencies to be utilized in implementation, the procedures to be utilized by those agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms may have required Section 5 preclearance." Brief for Appellees at 15. The State's only Section 5 submission of these procedures, however, was the Secretary of State's December 1994 submission. That submission plainly contemplated a unitary system of voter registration and included no procedures or instructions distinguishing NVRA registrants from other registrants for purposes of state and local elections. Brief for Appellants at 7-11.[1]

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[1] As the Mississippi Attorney General's February 10, 1995, memorandum acknowledged, "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections." J.S. App. 21a; *see also* J.S. App. 7a. That assumption would be natural because the State's NVRA plan, implemented as of January 1, 1995, made no distinction between eligibility for federal and state elections.

Appellees are thus forced to argue that the nature of the Secretary of State's NVRA submission changed automatically when proposed state legislation was tabled on January 25, 1995, and that the submission changed in precisely the manner necessary to secure preclearance of the State's current federal-election-only NVRA procedures -- all without any further Section 5 submission by the State. All of this was accomplished, according to appellees' theory, because the Attorney General knew of the senate committee's action. *See* Brief for Appellees at 29-30 ("The Attorney General made a knowing choice to preclear administrative changes after she knew the proposed legislation had been defeated.") This argument fails for several reasons.

First, appellees misapprehend settled authority by arguing that the United States Attorney General had the burden to inquire "what the effect of the defeat of the legislative package would have been" and to "require[] a proper submission restricted only to *completed* changes." Brief for Appellees at 32. Section 5 places on the covered jurisdiction, not the U.S. Attorney General, the burden of removing ambiguities and making a proper submission. *Clark v. Roemer*, 500 U.S. 646, 658-659 (1991); *McCain v. Lybrand*, 465 U.S. 236 (1984).

Appellees argue that *Clark* and *McCain* are distinguishable because in this case the Attorney General would have "violated her own regulation" by preclearing "legislative changes that had not yet occurred." Brief for Appellees at 31. But the Attorney General did no such thing. The Justice Department's February 1, 1995, preclearance letter specifically identified "the publications of the Office of the Mississippi Secretary of State" as the submission being precleared. J.S. App. 15a. It further advised the State that if legislation were later enacted it would have to be submitted separately for preclearance. J.S. App. 17a. However, because the State clearly announced its intent to

begin implementing its NVRA plan *before* the legislature acted, the Attorney General properly requested a Section 5 submission of those changes, and it was the State's duty to submit them, whether implemented administratively or through legislation.[2]

By contending that no Section 5 submission of Mississippi's NVRA procedures should have been made or considered until legislation was enacted, Mississippi is saying, in effect, that it should have been free to implement unprecleared changes so long as they were not enacted by the legislature. That disregards the express language of Section 5, which covers not only changes in statutory enactments, but also any "standard, practice or procedure" with respect to voting,

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[2] Appellees contend that the Attorney General's February 1, 1995, letter precleared two changes that could have been accomplished only through legislation, therefore proving that the Attorney General must have been attempting to preclear the unenacted legislation. Brief for Appellees at 16. The changes cited by appellees are the elimination of the attesting witness requirement from the state mail-in form and elimination of the state's purge for nonvoting. *Id.* Appellees' interpretation is incorrect. Both of these changes were expressly set forth in the November 1994 implementation manual, J.A. 30, 35, for which the Secretary of State requested preclearance, J.A. 109-110. Furthermore, the revised mail-in form, which omitted the attesting witness requirement, was also submitted for preclearance, J.A. 50. The fact that these changes were *also* included as part of the proposed state legislation is immaterial; so were numerous other changes that the state now concedes were the proper subject of the Attorney General's Section 5 review, Brief for Appellees at 15, including the designation of agencies where registration was to be conducted, the procedures to be used by those agencies, and the manner of transmitting forms to the circuit clerks. Attach. E., U.S. Summ. Judg. Mot. (proposed legislation, Sections 1 and 2). The appellees' artificial distinction between "two basic types [of changes], administrative and legislative," that purportedly were contemplated in the State's NVRA implementation plan, Brief for Appellees at 3, is simply a post-hoc characterization that is not reflected in the materials for which submission was requested.

and any changes that covered jurisdictions "seek to administer." 42 U.S.C. § 1973c. It also directly thwarts the purposes of Section 5. "Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law." S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 47, *quoted in NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 132 n.19 (1985).

Second, it is implausible to suggest that the U.S. Attorney General actually carried out her duty of evaluating the possible discriminatory purpose or effect of a dual registration requirement for NVRA registrants, and knowingly precleared such procedures, based on the submission that was before the Attorney General. The State did not even announce its procedures for implementing the NVRA on a federal-election-only basis until February 10, 1995, ten days after the Attorney General issued her preclearance letter. Appellees' theory thus assumes that the *concept* of a federal-election-only plan was evaluated and precleared, without submission or preclearance of any of the *procedures* through which such a plan must be implemented.[3] It assumes, for example, that the Attorney

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[3] Implementing the NVRA for federal elections only, while requiring separate registration for state and local elections, required a variety of new procedures, including procedures to distinguish NVRA registrants from other registrants on the voter rolls, procedures to notify registrants of their ineligibility for state and local elections, procedures for offering re-registration opportunities for state and local elections, and procedures limiting the NVRA's purge and list-maintenance requirements to federal elections. J.S. App. 20a-23a (memorandum of February 10, 1995). For those already placed on the books for all purposes in early 1995, the State also had to determine the procedures for canceling their registrations for state and local elections. These practices were addressed in the State's February 10, 1995, memorandum, but were not addressed at all in the Section 5 submission. The State therefore cannot argue that it has received preclearance for these practices.

General would knowingly preclear voter registration forms for use in a federal-election-only system, when those forms do not even mention that the voter will be eligible to vote only in federal elections. *See McCain v. Lybrand*, 465 U.S. at 254 (noting that "it would require a wild flight of imagination" to assume the 'Attorney General properly evaluated the discriminatory purpose or effect of a change not specifically identified in the submission).

Third, Mississippi's proposed rule of construction -- under which the scope of a preclearance determination depends upon post-hoc analysis of whether the Attorney General could have requested additional information before preclearing a submitted change -- would backfire on covered jurisdictions by bringing the Section 5 preclearance process to a standstill. The Attorney General would be forced to reject many more submissions and to delay final preclearance determinations because of possible uncertainty about the implications of unsubmitted changes. This Court's consistent rule that preclearance extends only to changes specifically and unambiguously identified by the covered jurisdiction ultimately benefits not only the citizens protected by Section 5, but the covered jurisdictions themselves, by making possible an expeditious administrative preclearance process for those changes that are specifically identified.

Fourth, it greatly overstates the case to say that, prior to the preclearance determination, "the proposed [state] legislation had been defeated," Br. at 30, much less that the U.S. Attorney General so understood. Tabling of legislation in committee is not the same thing as "defeat" of legislation. In fact, even the State's February 10, 1995, memorandum acknowledged that further legislative action in 1995, though perhaps unlikely, was still possible, J.S. App. 21a; *see also* J.A. 115 (noting possibility of further legislative action). If the Attorney General

had delayed in granting preclearance, and the legislation then had been brought to the floor late in the session and enacted, Mississippi would have faced an entirely different set of problems because of the extended period during which registration would have been conducted under unprecleared procedures. Had that scenario transpired, Mississippi no doubt would now be expressing outrage over the delay in preclearance. Viewed from the perspective of the Attorney General in January 1995, rather than appellees' hindsight perspective, preclearance of the submission then before the Attorney General was appropriate and cannot be read to cover changes not submitted at the time.[4]

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[4] Appellees have tacitly conceded the ambiguity of the Section 5 submission by shifting their own position concerning what NVRA procedures were properly submitted and precleared. In their Motion to Affirm, appellees stated that the only "choices" that might require submission were "[t]he State's choices regarding discretionary agencies which will be utilized in implementation, and the States' choices regarding purging procedures," insisting that "[a]ll the other items" in the Section 5 submission were "superfluous for Section 5 purposes." Motion to Affirm at 9. Now, appellees acknowledge that a few more of these so-called "superfluous" items may in fact have been required to be submitted and precleared, including "the procedures to be utilized by [the] agencies, the manner of transmitting NVRA applications to circuit clerks, and the NVRA voter registration forms." Brief for Appellees at 15. Appellants submit that appellees' list of changes requiring preclearance is still too short because it excludes, *inter alia*, the crucial procedures establishing limited eligibility for NVRA registrants. In any event, if the State's position concerning what was and was not properly submitted to and considered by the United States Attorney General shifts from brief to brief, based on months of opportunity to ponder the question, the State can hardly argue that its Section 5 submission was unambiguous from the perspective of the United States Attorney General, who was required to act within a 60-day deadline while simultaneously considering hundreds of other Section 5 submissions.

Fifth, the State's theories are self-contradictory. If the official who made the Section 5 submission was indeed acting as an "errant" and "rogue" employee (Brief for Appellees at 14, 24), who "incorrectly anticipated" that a unitary NVRA registration plan would be approved by the state legislature (Br. at 23), it is illogical to argue at the same time that the Section 5 submission was somehow adequate to identify and secure preclearance of the state's current federal-election-only plan. If the Section 5 submission was based on the Secretary of State's allegedly misguided view that a unitary system was to be implemented, it follows that the preclearance determination was based on the same understanding, whether misguided or not. Compliance with Section 5 therefore requires that Mississippi now submit for preclearance the NVRA plan it does wish to implement.

II. MISSISSIPPI'S PRACTICES ARE NOT EXEMPT FROM PRECLEARANCE.

A. Mississippi's Changes in Voting Practices to Implement a Federal-Election-Only NVRA Plan Are Not Exempt from Section 5 Coverage.

Because Mississippi has not received preclearance for its current registration practices, it must submit them for preclearance unless they are exempt from coverage. Appellees argue in Parts C and D of their Brief that the bare decision or "choice" to implement the NVRA only for federal elections does not require preclearance, characterizing this as "a decision to make no change." Brief for Appellees at 26. They acknowledge that "[i]f the State had adopted changes in its State voting requirements, those changes would have been subject to preclearance." *Id.* at 33. Appellees assert, however, that "the existence of a separate, federal-only, registration system does not require preclearance," Br. at 32, heading D

(capitalizations omitted), because "[t]his condition is brought about by federal law." *Id.* at 33.

Appellees' argument rests on a fiction: that states need not submit changes in voting practices or procedures for preclearance unless they make changes in their statutory law. The State clearly did adopt changes in its "voting requirements," *cf.* Brief for Appellees at 33, under the inclusive definition set forth in the Voting Rights Act, which covers not only statutes but any "standard, practice or procedure" with respect to voting. 42 U.S.C. 1973c; *see, e.g.*, n.3, *supra*. The State's failure to enact legislation in response to the NVRA thus does not alter the State's responsibility to submit for Section 5 preclearance the changes it actually has made in its registration practices. Appellants do not argue that a bare decision not to enact new legislation is covered by Section 5, but they do argue that the State must submit for preclearance the procedures it *is* administering which implement the NVRA as a federal-election-only system, as set forth in the State's February 10, 1995, memorandum. Moreover, in making the preclearance determination the Attorney General is entitled to examine the effect that the federal-election-only system will have on minority registration and participation in the entire election process, which includes state and local elections, regardless whether the State alters its registration procedures for such elections. *See City of Lockhart v. United States*, 460 U.S.125, 131-132 (1983) (changes must be evaluated in context of entire election system which they affect); Brief for Appellants at 29. That examination can be made only when Mississippi finally submits its federal-election-only procedures for preclearance to the Attorney General or the D.C. District Court.

Further, the State did choose effectively to alter its statutory requirements when it decided to implement the NVRA only for federal elections, because Mississippi statutory law

currently provides for a unitary registration system. Miss. Code Ann. § 23-15-11. Prior to 1995, and prior to issuance of the State's February 10, 1995, memorandum, circuit clerks had no authority to prevent any class of registered voters from voting in state and local elections. While the NVRA does not require states to use NVRA procedures for state and local elections, it is equally true that the NVRA does not require Mississippi to abandon its important state policy of having a unitary registration system. The alteration of that policy is a change implemented by Mississippi and requires preclearance.[5]

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[5] The only state-law registration provision that Mississippi has identified as a bar to full eligibility for NVRA registrants is the state requirement of an attesting witness' signature on mail-in registration forms. The NVRA registration forms contain all of the information that is required to determine if a voter is qualified as an elector under Mississippi law, fully complying with the conditions that Mississippi imposes for eligibility (*e.g.*, age, citizenship, 30-day residency, absence of conviction for disqualifying crimes, mental competence; *see* Miss. Code Ann. § 23-15-11). Arguably, Mississippi law does not even require the signature of an attesting witness as an absolute precondition to registration, because the list of reasons for which mail-in applications may be rejected by registrars does not specifically include the absence of an attesting witness signature; an incomplete application is cause for rejection only if the omission "makes it impossible for the registrar to determine the eligibility of the applicant to register." Miss. Code Ann. § 23-15-47(2)(d)(i). Further, since NVRA registrants typically register in person at drivers' license offices and other designated agencies, the justification for treating those forms as *mail-in* forms requiring an attesting witness is unclear. Without changing state law at all, agency officials could be appointed as deputy registrars authorized to accept in-person registrations. Miss. Code Ann. § 23-15-223. In any event, assuming the NVRA forced Mississippi to depart from *either* its unitary registration policy, *or* its more technical requirement of an attesting witness signature on mail-in forms, Mississippi's decision to alter its unitary registration policy is indeed the proper subject of Section 5 review.

In arguing that "conditions initiated and required by *federal* law are not within the scope of Section 5 coverage," Br. for Appellees at 14, appellees persist in ignoring this Court's decisions. Appellees still refuse to cite or discuss *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), even though that decision squarely refutes the district court's holding that, in performing a "nondiscretionary act required by federal law," Mississippi was exempt from the preclearance requirement J.S. App. 9a. *See* Brief for Appellees at 41-44.

Appellees' complaints about "bootstrapping" the NVRA and Section 5, and their strained effort to invoke *Miller v. Johnson*, 115 S. Ct. 2475 (1995), Brief for Appellees at 28, are unfounded. The requirement that states comply with Section 5 when implementing the NVRA is found in the NVRA itself, which expressly provides that the NVRA's requirements do not "supersede, restrict or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1); *see also* 1973gg-9(d)(2). Section 5 does not interfere with a state's decision to apply the NVRA only to federal elections *unless* the practices and procedures adopted by the state are racially discriminatory in purpose or effect. Mississippi's history of racial discrimination in voting is probably the best illustration of why Congress rejected the option of exempting NVRA-related changes from Section 5 review.[6] To appellants' knowledge,

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[6] Appellees argue in a footnote that implementation of the NVRA as a federal-only system will not amount to retrogression. Br. for Appellees at 27 n.4. However, the fact-bound question of whether Mississippi's chosen procedures will be discriminatory in effect, or were adopted for a discriminatory purpose, is precisely the question reserved to the Attorney General or the D.C. District Court in the first instance, and Mississippi needs to submit its procedures immediately to one of those authorities so that determination can be made. In any event, it is entirely speculative to argue that, under the State's new procedures, "the number registered to

Mississippi is also the only covered jurisdiction that is insisting it need not submit its NVRA-related changes for Section 5 preclearance. The parade of horribles that appellees invoke if Section 5 preclearance is required here is thus highly unrealistic; Mississippi is already the last straggler in the parade. *Cf.* Attach. S, U.S. Mot. For Summ. Judg., Declaration of Barry H. Weinberg, Deputy Chief, Voting Section, ¶ 3 (noting that Justice Department had received 40 NVRA-related submissions from 14 covered states or jurisdictions as of June 23, 1995).

B. Mississippi's "Unratified Act" Theory Is Incorrect and Does Not Exempt the State's Voting Changes from Section 5 Coverage.

Appellees devote much of their Brief to arguing that the unitary NVRA plan that officials began implementing in January 1995 should not be the "benchmark" for "retrogression" because it was not ratified by the legislature or governor. *See, e.g.*, Brief for Appellees at 21. They make two basic sets of arguments on this point: one, that any implementation of NVRA procedures on a unitary basis -- that is, for state and local elections as well as federal elections -- should be disregarded because the Secretary of State lacked authority to

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vote in federal elections will increase" and the number registered to vote in State elections "will not be decreased." *Id.* For example, if people who register to vote under the State's NVRA procedures are unaware that a separate registration is still required for state and local elections, they may forgo other registration opportunities in the belief they are already registered. Conversely, NVRA registrants who receive notice that they are not eligible for all elections, but only federal elections, may well stay home entirely if they do not fully understand the distinction, especially if federal and state elections are both on the ballot. Mississippi's recent history, moreover, illustrates that dual registration requirements have a disproportionate impact on the State's black voters. Brief for Appellants at 29-31 & n.11.

implement such a plan, Br. at 17-26; and two, that the Attorney General's grant of preclearance was an improper effort to change Mississippi statutory law and create a benchmark for retrogression. Br. at 28-31.

Both of these arguments reflect a misunderstanding of the nature of a Section 5 enforcement action such as this. In this action, the local three-judge district court did not have jurisdiction to determine whether the challenged procedures are or are not retrogressive, or for that matter whether they were motivated by a discriminatory purpose. The only issue before the court was whether the procedures constitute a change, not whether that change is discriminatory. Brief for Appellants at 25. Because Mississippi's current practices reflect a change -- whether measured against the pre-1995 system or against the NVRA procedures in use from January 1, 1995, through February 10, 1995 -- the legal status of the latter procedures is not dispositive of this appeal.

In any event, both of the State's arguments are incorrect. As to the first, the State contends that no change occurred when election officials stopped implementing the NVRA on a unitary basis and canceled the state-election eligibility of NVRA registrants, because unitary implementation violated state law and was merely the act of a "rogue official." Brief for Appellees at 21. In the first place, appellees have mischaracterized the actions of the Secretary of State's office. Ms. Constance Slaughter-Harvey was not a minor functionary, but the General Counsel to the Secretary of State and Assistant Secretary of State for Elections. Under Mississippi law, which appellees fail to cite, an Assistant Secretary of State has "the power and authority under the direction and supervision of the secretary of state to perform all duties required by law of that officer," and such officials are not civil service employees, but serve "at the will and pleasure of the secretary of state." Miss. Code Ann. §

7-3-71. Thus, her actions were those of the Secretary of State for the purposes of Mississippi law; obviously, the Secretary of State is not required personally to conduct all of the functions of his office.

Further, appellees are unable to reconcile their position with the holding of *Perkins v. Matthews*, 400 U.S. 379 (1971), which holds that changes in voting practices must be submitted for preclearance even when the change is required by state law. The City of Canton's argument in *Perkins* was no different from the State's argument here: Canton contended that the state legislature had the authority to prescribe the election system to be used by the city, and that no voting change occurred when the city simply corrected its previous illegal practice of using an election scheme barred by state law. *Id.* at 394 ("Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections"). To borrow the appellees' term, the Mississippi Legislature was the relevant "body politic" in *Perkins* no less than in this case.

Indeed, in *Perkins*, there was no evidence at all that any agent of the State itself had ratified or authorized the acts of the City of Canton that were contrary to Mississippi law, yet the illegality of Canton's acts under state law was held irrelevant to the Section 5 inquiry. Here, where state officials were directly involved in carrying out the practices alleged to be illegal under state law, the *Perkins* holding should apply with even greater force.

Appellees rely upon *United States v. St. Landry Parish School Board*, 601 F.2d 859 (5th Cir. 1971), which holds that the illegal acts of vote-buying committed by three local election officials in one election district of one parish did not constitute "changes" administered by the state for the purposes of Section 5 coverage. As the *St. Landry* decision observes, Section 5

preclearance would be superfluous as applied to "voting procedures that a state does not wish to enact or administer." 601 F.2d at 864. That observation has no application here, because the State clearly *did* wish to administer its NVRA plan starting January 1, 1995, and that plan made changes in the State's registration procedures. Preclearance, therefore, was necessary.

St. Landry further holds that "[a] voting procedure need not have the seal of the state to come within § 5, but it must be more than these isolated instances of bargaining for votes." 601 F.2d at 865. Although the narrow exception recognized in *St. Landry* for isolated, obvious illegalities may be appropriate, it does not remotely fit the facts here. The actions in question are those of state officials and were widely publicized, not conducted surreptitiously in a voting booth. The Secretary of State was appointed by the Governor to coordinate the state's NVRA compliance, and was acting under state law that expressly provides for a unitary registration system, Miss. Code Ann. § 23-15-11 -- a policy that state officials, presumably, are not free to ignore. The unitary NVRA plan that the State now contends was unauthorized was developed by an Implementation Committee that included representatives of the legislature, the governor, the attorney general, and the secretary of state. That plan was widely publicized as going into effect on January 1, 1995 -- without awaiting action by the legislature. Brief for Appellants at 6-8. [7] Thousands of voters then actually

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[7] Appellees argue that the Secretary of State gave only "verbal advice" to implement the NVRA on a unitary basis. Brief for Appellees at 17; *see also* Br. at 19 ("No transcription or other reproduction of the actual communication has been presented in this proceeding"). But the Secretary of State's November 1994 manual, J.A. 26-49, which was distributed to circuit clerks and county election commissioners throughout the State, is obviously a written document. Although that manual does not

registered under that plan under the assumption of eligibility for all elections. J.S. App. 7a.

If Mississippi were free to disclaim such openly publicized, broadly administered acts by its election officials, even after thousands of voters have registered in reliance on the validity of the procedures, few registration practices short of an actual legislative enactment would be covered by Section 5. That would be at odds with the broad remedial scope Congress intended for Section 5. Neither *St. Landry* nor the other lower court decisions cited by appellees recognize an exception to the preclearance requirement that is broad enough to cover the widely administered, state-sanctioned implementation plan at issue here.[8] *Cf. Henderson v. Graddick*, 641 F. Supp. 1192

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expressly instruct circuit clerks to place NVRA registrants on the voter rolls for state and local elections, it also does not expressly instruct circuit clerks to place such registrants on the voter rolls for *federal* elections. The manual simply does not distinguish between eligibility for state and federal elections, and assumes that circuit clerks will process registration forms in their usual manner -- which under Miss. Code Ann. § 23-15-11 results in eligibility to "vote in all elections." The training sessions conducted for circuit clerks in 1994 simply reinforced the manual's instructions, which clearly assumed a unitary process. The voter registration forms themselves -- which obviously are written documents -- speak of "registering to vote," without mentioning any restriction to federal elections. *E.g.*, J.A. 46. Thus, appellees' attempted distinction between the procedures set forth in the November 1994 manual, and the so-called "verbal" advice concerning a unitary process, is artificial. *See also* R. 13, Defendants' Itemization of Facts, ¶ 10 (admitting that circuit clerks were advised by Secretary of State's office to register voters for all purposes beginning January 1, 1995).

[8] *See Miller v. Daniels*, 509 F. Supp. 400 (S.D.N.Y. 1981) (allegations by defeated candidate of irregularities in one election do not amount to covered changes); *Montgomery v. LeFlore County Repub. Exec. Comm.*, 776 F. Supp. 1142 (N.D. Miss. 1991) (same); *Beatty v.*

(M.D. Ala. 1986) (three-judge court) (when state Attorney General issued memorandum encouraging cross-over vote in primary, memorandum constituted a change subject to Section 5 preclearance notwithstanding illegality of Attorney General's action).

Appellees' second argument is based on a mischaracterization of appellants' position. Appellants do not contend that "Ms. Slaughter-Harvey's submission together with the Justice Department's letter of preclearance served to change Mississippi statutory law regarding registration for State elections." Brief for Appellees at 14. A preclearance determination does not create or change state law, but merely makes the precleared practice, whether instituted administratively or by statute, legally enforceable under Section 5. Here, the unitary NVRA system became a practice "*in fact* in force or effect" under *Perkins*, 400 U.S. at 395, not simply because of the Attorney General's preclearance determination, but because state officials actually implemented it.[9]

Esposito, 439 F. Supp. 830 (E.D.N.Y. 1977) (same); *Citizens' Right to Vote v. Morgan*, 916 F. Supp. 601 (S.D. Miss. 1996) (city resolution declining to place bond issue on ballot based on insufficient signatures was not covered change).

[9] Appellees contend that "[n]o one with the State Attorney General's Office was even aware that Ms. Slaughter-Harvey's submission to the Department of Justice had been made." Brief for Appellees at 7. Even if that assertion were supported in the record, it would be irrelevant, because *someone* had to make a submission of the changes being implemented on January 1, 1995. But the State's assertion is unsupported. Appellees' summary judgment motion included no affidavits asserting that the Secretary of State lacked authority to make the Section 5 submission, nor that the Mississippi Attorney General was unaware of the submission. At oral argument, counsel for the United States noted that the Justice Department had contacted the Mississippi Attorney General concerning the

Thus, regardless of whether Mississippi changed its statutory law, the State clearly made changes in its pre-1995 registration practices and procedures, and the State did not await action by the legislature before implementing those changes as of January 1, 1995. Mississippi therefore had to submit these new practices and procedures for preclearance, because Section 5 covers not only changes in statutory enactments, but also any "standard, practice or procedure" with respect to voting, and any changes that covered jurisdictions "shall enact or seek to administer." 42 U.S.C. § 1973c.[10]

Further, state law contradicts appellees' new claim, raised for the first time in this litigation, that circuit clerks are not agents of the state and are "answerable only to county voters." Brief for Appellees at 20. Appellees apparently wish to argue now that the unprecleared changes here are not the responsibility of the appellees, but should have been submitted by each individual circuit clerk. Such post-hoc denials of responsibility are nothing more than an effort to evade Section 5 review and should be rejected. Miss. Code Ann. § 23-15-223 provides that circuit clerks are appointed by the State Board of Election Commissioners to serve as registrars for elections in

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submission, and that the Mississippi Attorney General had expressed no objection to the Justice Department's consideration of the Secretary of State's submission. July 19, 1995 Tr. at 87.

[10] While appellees castigate the Justice Department and the State's own representative for creating "confusion" in the State's NVRA implementation, Brief for Appellees at 2, the responsibility for any such confusion rests squarely with the State itself. The State knew in mid-1993 that compliance with the NVRA was required as of January 1, 1995. The State could have taken up the question of NVRA legislation in its 1994 session and made a final decision on implementation in time to secure preclearance prior to the NVRA's effective date. The State's failure to do so is the State's responsibility.

each county. The State Board of Election Commissioners consists of the governor, the attorney general, and the secretary of state, Miss. Code Ann. § 23-15-211(1). Thus, while circuit clerks, to the extent they function as clerks of the circuit courts, are answerable to the voters, Miss. Const., art. VI, sec. 168, they are executive appointees and agents of the State Board of Election Commissioners in their capacities as registrars. *See also* Complaint at ¶ 13 (identifying defendant governor, attorney general, and secretary of state as members of State Board of Election Commissioners).

Appellees' denial of the obvious continues with their claim that "the February 10 memorandum was not a 'directive'" to circuit clerks and county election commissions. Brief p. 8. The February 10, 1995, memorandum, however, states that its purpose is "to offer additional direction to circuit clerks and county election commissioners as to how they should proceed." J.S. App. 20a. In light of the state statutes cited above, and the State's obvious practice of issuing guidelines to circuit clerks and county election commissioners through materials prepared by the Secretary of State and Attorney General, it is wholly incredible for the State now to claim that circuit clerks are not acting for the State in implementing the NVRA, and that any unprecleared changes are solely the responsibility of each individual circuit clerk.[11]

Finally, as noted above, it is clear that none of appellees' arguments concerning the "benchmark" status of the practices

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[11] Indeed, circuit clerks have no authority under state statutory law to exclude any registered voters from voting in state and local elections. Those directions came from the State's February 10, 1995, memorandum, just as the circuit clerks' practices from January 1, 1995 through February 10, 1995, were based on the materials and implementation manual prepared by the Secretary of State.

in effect from January 1, 1995, to February 10, 1995, would be dispositive of this appeal, even if those arguments were correct. The State is in violation of Section 5's preclearance requirement regardless of the status of the procedures that were in effect in Mississippi from January 1, 1995 through February 10, 1995. Even assuming the Secretary of State was wrong to implement NVRA procedures on a unitary basis and should not have submitted such a plan for preclearance in advance of action by the legislature, and even assuming that submission and the Attorney General's preclearance letter are treated as nullities, then Mississippi's current registration system still reflects a change from the last pre-cleared system, which was the system in effect prior to January 1, 1995. Mississippi therefore should, without further delay, submit its current procedures for Section 5 review by the Attorney General or the District Court for the District of Columbia.

CONCLUSION

The decision of the district court should be reversed, with directions to enter appropriate relief as previously described in appellants' opening brief. Brief for Appellants at 44.

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No. 95-2031

In the Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, ET AL., APPELLANTS

v.

KIRK FORDICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Mississippi is violating the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, by administering a registration system that reflects changes resulting from the manner in which it has chosen to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, when those changes have not been precleared.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-9a) is unreported.

JURISDICTION

The three-judge district court entered its final judgment on February 9, 1996. J.S. App. 10a-11a. Appellants filed a notice of appeal on April 8, 1996. J.S. App. 12a-14a. On May 30, 1996, Justice Scalia extended the appellants' time to file a jurisdictional statement until June 17, 1996, and the jurisdictional statement was filed on that date. This Court noted probable jurisdiction on October 1, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, are reproduced as an appendix to this brief.

STATEMENT

This case involves the State of Mississippi's decision to implement the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.* (NVRA), by applying that statute's procedures to registration for federal elections but not to registration for state and local elections. For several years prior to January 1, 1995, the effective date of the NVRA, Mississippi had a "unitary" system of registration, under which all lawfully registered voters were entitled to vote in all elections—federal, state, and local. On February 10, 1995, however, Mississippi announced that it would henceforth implement a two-tiered or "dual" system of registration. Voters who register pursuant to the NVRA's procedures are entitled to vote only in federal elections and must register again if they wish to vote in state and local elections, while voters who register pursuant to the State's pre-existing procedures may vote in all elections.

Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51, App. Section 5 provides that a covered jurisdiction may not enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless (1) the United States District Court for the District of Columbia issues "a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) the

proposed change "has been submitted * * * to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission." 42 U.S.C. 1973c. The question presented in this case is whether Mississippi's federal-election-only implementation of the NVRA violates Section 5.

1. Mississippi has a long history of imposing discriminatory and burdensome registration requirements that have impeded minority citizens' exercise of the right to vote. See, *e.g.*, *United States* v. *Mississippi*, 380 U.S. 128, 131-133 (1965); *Jordan* v. *Winter*, 604 F. Supp. 807, 811-812 (N.D. Miss.) (three-judge court), summarily aff'd *sub nom. Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984). Because of its history of discriminatory voting practices, the State was one of the jurisdictions originally covered by the special provisions of the Voting Rights Act. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315-316, 329 (1966). As recently as 1987, a federal district court found that the State had violated Section 2 of the Voting Rights Act by maintaining a dual system that required voters to register for state elections in a separate procedure from the one in which they registered for local elections. See *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991) (*PUSH*).

2. The NVRA became effective in Mississippi on January 1, 1995. See 42 U.S.C. 1973gg note. The NVRA requires States to implement procedures designed to make registration less burdensome on voters and to remove opportunities for discrimination in the registration process. See generally 42 U.S.C. 1973gg (findings and purposes). The NVRA requires States to (1) treat every driver's license application as an application for voter registration, see 42 U.S.C. 1973gg-3; (2) accept applications for voter registration by mail, see 42 U.S.C.

1973gg-4; and (3) distribute voter registration applications with each application for services at various state agencies, including all public assistance and disability agencies as well as other agencies designated by the State, see 42 U.S.C. 1973gg-5. The NVRA also regulates the content of voter registration forms, see 42 U.S.C. 1973gg-3(c)(2)(B); 42 U.S.C. 1973gg-7(b)(1), and limits purges of voting rolls, see 42 U.S.C. 1973gg-6.[1]

The NVRA's requirements apply to elections for federal office. See, *e.g.*, 42 U.S.C. 1973gg-2(a) (Act requires States to "establish procedures to register to vote in elections for Federal office"). The statute allows each State to decide whether or not to apply the NVRA procedures to registration for state and local offices as well. See, *e.g.*, H.R. Rep. No. 9, 103d Cong., 1st Sess. 21 (1993) ("While this Act applies only to Federal elections and States are free to apply other regulations to State elections, many States will prefer to have the same requirements for both Federal and State elections."). Except for Mississippi, every State that has implemented the statute allows NVRA registrants to vote in all elections.[2]

3. Between the district court's 1987 decree in *PUSH* and the effective date of the NVRA, "Mississippi main-

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[1] The lower courts have upheld the NVRA against constitutional challenge. See, *e.g.*, *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); *Association of Community Orgs. for Reform Now (ACORN)* v. *Edgar*, 56 F.3d 791 (7th Cir. 1995).

[2] Illinois's executive branch initially decided to implement the NVRA for federal elections only. That system was recently invalidated on state-law grounds, and the State has been enjoined to enroll all NVRA registrants for state and local, as well as federal, elections. See *Orr* v. *Edgar*, No. 1-96-1613, 1996 WL 549559 (Ill. App. Ct. Sept. 26, 1996). The time to appeal that decision to the Illinois Supreme Court has now expired.

tained a unitary system of voter registration: once a voter was registered properly for any election, he was registered effectively for all elections—local, state, and federal." J.S. App. 7a. State law provided that every citizen who met certain age and residency qualifications, who had not been convicted of specified crimes, "and who shall have been duly registered * * * by an officer of this state under the laws thereof * * * shall be a qualified elector in and for the county, municipality and voting precinct * * *, and shall be entitled * * * to vote at any election." Miss. Code Ann. § 23-15-11 (1990).[3]

On the NVRA's effective date, Mississippi's existing registration procedures were inconsistent with the federal statute in several respects. See U.S. Mot. for Summ. J. Attach. D6. Accordingly, the State was required to change its practices in order to conform them to the federal statute. See generally *ibid.* On December 5, 1994, the Attorney General of the United States formally asked the State to submit for preclearance any changes prompted by implementation of the NVRA. J.A. 105-106.

4. On December 20, 1994, the State submitted a package of NVRA-related voting changes to the Attorney

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[3] Despite that provision, voters who registered prior to 1984 were required to register for municipal elections through a procedure separate from the one in which they registered for state and federal elections. See *PUSH*, 674 F. Supp. at 1248-1249. In 1984, the state legislature prospectively eliminated that dual system to a large extent, but dual registration remained in many municipalities, and voters who had registered for state and federal elections under the old system were not automatically placed on the municipal voting rolls. See *id.* at 1249-1250. Following the *PUSH* court's decree, the State extended its 1984 changes to all municipalities and made those changes retroactive. See *Mississippi State Chapter, Operation PUSH* v. *Mabus*, 932 F.2d 400, 404 (5th Cir. 1991).

General for preclearance. See J.A. 109-110.[4] In its letter of submission, the State sought preclearance for an implementation manual (dated November 1994) prepared by the Secretary of State's office. *Ibid.* According to the State's letter, that manual constituted "Mississippi's plan to administratively implement NVRA." J.A. 109.[5] The State also transmitted an earlier implementation manual (dated July 1994), a publication describing NVRA registration procedures at state agencies, a set of new voter registration forms, information on training provided to state and local election officials, and a copy of draft legislation to conform state law to the NVRA. Attachs. D7-D13. A sentence in a table in a July 1994 compliance report included in the materials provided to the Attorney General stated that the proposed legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72.

Mississippi's submission letter and accompanying materials did not assert that the State intended to abandon its prior unitary registration system and utilize the NVRA procedures for federal elections only. Instead, both the State's "plan to administratively implement NVRA" and the other submitted materials implied that all voters enrolled pursuant to the federal statute would be registered for both state and federal elections. For example, the manual stated that Mississippi's prior mail-in registration form "ha[d] been redesigned" to conform with NVRA requirements. J.A. 30. The revised form, included in the submission, bore the title of "Mississippi Voter Registration Application." J.A. 50. It stated, "[i]f you are

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[4] We have lodged the State's submission with this Court.

[5] Section 5 applies to administrative as well as legislative changes in election law. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985).

not registered to vote where you now live, you can use this form to register to vote or report that your name or address has changed." *Ibid.* Similarly, the submission included a new form to be used in voter registration at driver's license offices; that form stated, "[u]nder the Motor-Voter Law, you may now make application to register to vote in Mississippi (or update your existing Mississippi Voter Registration) on the same form used for your Driver Services-related application." J.A. 62. The administrative manual also stated that the "NVRA requires election commissioners to follow specific procedures to purge voter registration lists," J.A. 34, and that certain "[c]urrent methods" of purging "will change" in light of the statute's requirements, J.A. 35.

From January 1, 1995, until February 10, 1995, many Mississippi election officials implemented the NVRA on a unitary basis and enrolled NVRA registrants for both state and federal elections. J.S. App. 3a-4a. Those officials did so in accordance with the instructions of Mississippi's Secretary of State, who had held training seminars for local election officials and state agency personnel in 1994. *Ibid.* At those seminars, the Secretary of State advised the officials "that citizens registering pursuant to the NVRA would be eligible for both federal and state elections." *Id.* at 3a.

On January 25, 1995, the proposed legislation to reconcile state law with the NVRA was tabled in the Mississippi legislature. J.S. App. 3a. The tabling of the proposed legislation created uncertainty regarding whether the State would continue to implement the NVRA on a unitary basis. Department of Justice officials were aware of that uncertainty but did not insist that the State make clear whether NVRA registrants would remain eligible to

vote in state and local elections.[6] The State did not withdraw its submission until the uncertainties were resolved, nor did it inform the Department that registration under the NVRA would be valid for federal elections only. The Department informed the State on February 1, 1995, that its submission had been precleared. *Id.* at 15a-19a. The preclearance letter did not identify the elections to which the NVRA procedures would apply.

5. On February 10, 1995, Mississippi's Secretary of State and its Attorney General jointly issued to state election officials a memorandum setting forth the status of NVRA registrants in Mississippi. J.S. App. 20a-23a. The memorandum stated that

> [v]oters who register under NVRA are presently not authorized to vote in state elections. Accordingly, circuit clerks must either prepare two separate sets of voter registration books and poll books, or, the clerks and election commissioners must "flag" voters registered under NVRA on the voter registration books and pollbooks to denote that they are registered under NVRA and thus are not presently authorized to vote in state elections.

Id. at 22a. The memorandum observed that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections. It is important, therefore, that they be informed that they presently are only authorized to vote in federal elections." *Id.* at 21a.[7] Voters who had registered

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[6] Department of Justice regulations governing the administration of Section 5 provide that the Attorney General may "request from the submitting authority any omitted information considered necessary for the evaluation of the submission." 28 C.F.R. 51.37.

[7] To implement that directive, the memorandum explained that

under NVRA procedures prior to February 10—and who had been placed on the rolls for all elections—were removed from the list of individuals eligible to vote in state and local elections. *Id.* at 4a.

6. On February 16, 1995, the Department of Justice formally requested that the State submit for preclearance its decision to treat NVRA registrants as ineligible to vote in state and local elections. J.S. App. 24a-25a. The Department's letter observed that "while, on February 1, 1995, the Attorney General granted Section 5 preclearance to procedures instituted by the state to implement the NVRA, that submission did not seek preclearance for a dual registration and purge system and, indeed, we understand that the decision to institute such a system was not made until after February 1." *Ibid.* When Mississippi refused to make such a submission, the United States brought an action to enforce the preclearance requirement. On April 20, 1995, the United States filed a complaint in the United States District Court for the Southern District of Mississippi. The complaint alleged that the State had violated Section 5 by adopting a dual system of voter registration without first obtaining pre-

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the Secretary of State's office is offering to notify by mail all voters registered under NVRA and present them the option of either visiting their circuit clerk's office and registering, or, completing a state mail-in voter registration form to be forwarded to their circuit clerk. The Secretary of State's office will bear the postage and printing cost for this effort. In order to complete this mailing, circuit clerks will be asked to provide to the Secretary of State a list of names and mailing addresses of all voters registered under NVRA. Clerks may, of course, elect to provide such notification themselves.

J.S. App. 22a.

clearance. Compl. ¶¶ 16-43.[8] On the same day, appellants brought a separate action, which alleged similar violations and sought similar relief. The two cases were consolidated (J.S. App. 5a), and a three-judge district court was convened to hear the Section 5 claim. See 42 U.S.C. 1973c.

7. On July 24, 1995, the district court issued an order granting the State's motion for summary judgment on the Section 5 claim and rejecting the plaintiffs' motions for summary judgment on that claim. J.S. App. 1a-9a. The court concluded that, under Mississippi law, only the legislature could decide to apply the NVRA's procedures to registration for state and local elections. *Id.* at 7a-8a. Because the State had never enacted proposed legislation to accomplish that end, the court believed that the Secretary of State's administrative authority to implement the NVRA extended to federal elections only. *Ibid.* In the district court's apparent view, the State's submission was limited to those aspects of implementation that the Secretary of State could accomplish administratively—those involving the implementation of the NVRA for federal elections—and those aspects "ha[d] been precleared" on February 1. *Ibid.*

Although many election officials had implemented the NVRA on a unitary basis from January 1 to February 10, the district court did not believe that the February 10 memorandum advising them to cease that practice constituted a voting change. It held that "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance." J.S. App. 8a.

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[8] The complaint also alleged that Mississippi was violating Section 7(a)(2)(B) of the NVRA, 42 U.S.C. 1973gg-5(a)(2)(B), by failing to afford voter registration at "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities." See Compl. ¶¶ 44-50.

The district court found "no evidence of ratification," observing that "there is no evidence that the governor or the legislature or the Mississippi Attorney General condoned the month-long practice on the part of some election officials to qualify voters contrary to applicable state law." *Ibid.*

Finally, the court stated that "the fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance." J.S. App. 8a. Because the obligation to apply NVRA procedures to federal elections is imposed by federal law, the court asserted,

> it is the federal government that has created this system of dual registration, not the State of Mississippi. The State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance * * *.

Id. at 8a-9a.

The district court accordingly ruled for the State on the Section 5 claims. After a voluntary resolution of the NVRA claims, the court entered a final judgment pursuant to Fed. R. Civ. P. 58 on February 9, 1996. J.S. App. 10a-11a.

SUMMARY OF ARGUMENT

1. Mississippi's implementation of the NVRA clearly effected substantial changes in the State's voter registration procedures. Although the NVRA can be expected to have salutary consequences for minority participation in federal elections, the changes effected by Mississippi may

well have a deleterious effect on minority voting in state and local elections, particularly if NVRA registrants are not adequately informed of their federal-election-only status. Indeed, Mississippi officials have acknowledged the possibility of voter confusion and the consequent importance of devising and implementing procedures to apprise NVRA registrants of their ineligibility to vote in state and local elections. It is therefore essential that the Attorney General or the District Court for the District of Columbia be given an opportunity, through the preclearance process, to ensure that the State's method of NVRA implementation does not have the purpose or effect of denying or abridging the right to vote on account of race or color.

2. Mississippi's current system for implementing the NVRA has not been precleared. Under well-established principles of Section 5 jurisprudence, all changes for which a covered jurisdiction seeks preclearance must be clearly and unambiguously identified in the submission made to the Attorney General. At the time of preclearance on February 1, 1995, neither the preclearance submission itself nor the actions of state officials made clear that Mississippi intended to limit its NVRA implementation to federal elections only. The Department's preclearance letter therefore cannot reasonably be construed as approving the State's current dual registration system. The Department's subsequent letter of February 16, 1995, further refutes any inference that the Department intended to preclear a dual system.

3. The district court appeared to recognize that the State's implementation of a dual registration system had not been submitted for preclearance. The court held, however, that the preclearance requirement was inapplicable. That holding is incorrect.

a. The fact that Mississippi's new registration procedures were implemented in response to a federal mandate does not render the preclearance requirement inapplicable. Although the NVRA did not require Mississippi to apply the Act's procedures in state and local elections, nothing in federal law prohibited the State from doing so. Mississippi's decision to limit the NVRA procedures to federal elections was a discretionary state policy choice, not the product of federal compulsion. Various subsidiary decisions—including decisions regarding the methods by which NVRA registrants would be informed of their federal-election-only status—were also discretionary. This Court's precedents make clear that covered jurisdictions must obtain preclearance before implementing changes adopted in an attempt to comply with federal law, and the NVRA itself confirms that rule. Mississippi's decision to implement the NVRA for federal elections only therefore is not exempt from preclearance as a nondiscretionary act required by federal law.

b. The district court also stated that the State "may correct a misapplication of its laws" without obtaining preclearance for the resulting change. J.S. App. 8a. This Court's precedents make clear, however, that Section 5 requires preclearance for any change from the practice that is *in fact* "in force or effect," even if the existing practice is inconsistent with state law. Here, the Mississippi Secretary of State instructed local registrars to treat NVRA registrants as eligible to vote in all elections, and many registrars followed that directive. The Secretary of State's instruction remained in effect for over a month, and thousands of voters were registered under NVRA procedures. Whatever the propriety of the Secretary of State's actions as a matter of state law, under the procedures actually "in force or effect" in Mississippi during January and early February of 1995, NVRA regis-

trants were eligible to vote in all elections. The State's subsequent decision to exclude those voters from state and local elections effected a change subject to Section 5's preclearance requirement.

Even if no unitary system of NVRA registration was ever "in force or effect" in Mississippi, it would not follow that the State may continue to implement its current dual system without obtaining preclearance. Mississippi's current practices and procedures for voter registration differ substantially from those in effect before January 1, 1995. Although the Department did issue a preclearance letter on February 1, 1995, its preclearance decision reflected the premise that Mississippi had sought preclearance for a practice of permitting NVRA registrants to vote in all elections. Because Mississippi's federal-election-only system was never submitted for preclearance (and indeed was adopted after the February 1 preclearance letter), that letter did not authorize the current system, which must be submitted for preclearance.

ARGUMENT

THE DISTRICT COURT WAS REQUIRED TO ENJOIN MISSISSIPPI'S FEDERAL-ELECTION-ONLY IMPLEMENTATION OF THE NVRA

Mississippi is a "covered jurisdiction" under Section 5 of the Voting Rights Act. See 28 C.F.R. Pt. 51, App. A covered jurisdiction may not enforce a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance for the change. 42 U.S.C. 1973c; *Lopez* v. *Monterey County*, No. 95-1201 (Nov. 6, 1996), slip op. 10; *Clark* v. *Roemer*, 500 U.S. 646, 652 (1991). A proposed voting change may be precleared either by the United States District Court for the District of Columbia (through the issuance of a declaratory judgment that the

change has no discriminatory purpose or effect) or by the Attorney General (if she fails to "interpose[] an objection" within the 60-day period after the proposed change is submitted to her). 42 U.S.C. 1973c.[9] In an action to enforce the preclearance requirement, a local three-judge district court may not consider whether the change is discriminatory in purpose or effect. By the terms of Section 5, that substantive question is reserved for the Attorney General or the District Court for the District of Columbia. The enforcement court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *Lopez*, slip op. 14 ("On a complaint alleging failure to preclear election changes under § 5, [the three-judge] court lacks authority to consider the discriminatory purpose or nature of the changes."); *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971). If the change is

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[9] Thus, preclearance by the Attorney General differs from preclearance through a declaratory judgment action

> in that implementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the *absence*, for whatever reason, of a timely objection on the part of the Attorney General.

Morris v. *Gressette*, 432 U.S. 491, 502 (1977) (footnote omitted); see 28 C.F.R. 51.42 ("the failure of the Attorney General to make a written response within the 60-day period constitutes preclearance of the submitted change"). In order to facilitate expeditious implementation of proposed changes, however, the Attorney General may (and typically does) affirmatively indicate, before the expiration of the 60-day period, that no objection will be made. 42 U.S.C. 1973c; 28 C.F.R. 51.41.

subject to preclearance but has not been precleared, the United States or private plaintiffs "are entitled to an injunction prohibiting implementation of the change." *Lopez*, slip op. 10; accord *Clark*, 500 U.S. at 652-653.

Applying those principles, the district court was required to enjoin Mississippi's dual system of voter registration. The State's implementation of the NVRA has effected a variety of changes in its prior registration practices and procedures. Because significant aspects of Mississippi's current system of NVRA implementation have not been precleared, the district court was required to enjoin those changes.

A. Mississippi's NVRA Implementation Required Changing The State's Existing Voter Registration Procedures

Mississippi's implementation of the NVRA clearly effected substantial changes in the State's voter registration procedures. See U.S. Mot. for Summ. J. Attach. D6; J.S. App. 3a (noting that the State's "submission included a manual drafted by the Secretary of State listing basic changes necessary to bring Mississippi's voter registration procedures in compliance with the NVRA"). Although the NVRA can be expected to have salutary consequences for minority participation in federal elections, the changes effected by Mississippi may well have a deleterious effect on minority voting in state and local elections. Because "it is well settled that every voting change with a 'potential for discrimination' must be precleared," *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 505 (1992); accord, *e.g.*, *Hampton County Election Comm'n*, 470 U.S. at 181, Mississippi was required to submit its NVRA implementation plan to the Attorney General or the District Court for the District of Columbia.

Under the State's federal-election-only NVRA system, NVRA registrants must be placed on separate voter lists, which will likely increase voter confusion at the polls. In addition, voters who register under the NVRA procedures may fail to register for state and local elections in the mistaken belief that NVRA registration is effective for all elections. To the extent that minority voters comprise a disproportionate percentage of NVRA registrants in Mississippi, the State's method of implementing the NVRA may "have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. Black voters in Mississippi may thus be worse off under a dual registration system than they were before the enactment of the NVRA.[10]

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[10] Indeed, Mississippi's adoption of a dual registration system raises particular Voting Rights Act concerns. Mississippi legislation expressly provides that every individual who registered to vote in any type of election is enrolled for all types of elections. See Miss. Code Ann. § 23-15-11 (1990). As recently as 1987, a federal court had invalidated an earlier dual system—in which persons were required to register for municipal elections in a procedure separate from the one in which they registered for state and federal elections—because it concluded that "Mississippi's original dual registration requirement was enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *PUSH*, 674 F. Supp. at 1251. The court further found that the dual system continued to "have a discriminatory result and deny black voters equal access to the political process." *Id.* at 1252. The court concluded that "[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal registration rolls, and this has probably resulted in the defeat of black candidates." *Id.* at 1255. It explained that, due to socioeconomic disparities between white and African-American Mississippi residents, the latter were disproportionately affected by the additional barrier to registration inherent in requiring voters to register separately for different types of elections. See *id.* at 1255-1256.

At the time they announced that NVRA registrants would be eligible for federal elections only, Mississippi's Attorney General and Secretary of State acknowledged that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections." J.S. App. 21a. Those officials recognized the importance of devising and implementing procedures to ensure that NVRA registrants were aware of their ineligibility to vote in state and local elections. *Id.* at 21a-22a. Yet they have never submitted such procedures for Section 5 review. Whether the State's implementation of the NVRA will "have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, may depend upon the adequacy of those procedures. It is therefore essential that the Attorney General or the District Court for the District of Columbia be given an opportunity, through the preclearance process, to assess the sufficiency of those safeguards.[11] As we demonstrate in Part B, *infra*, neither the

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More recent data demonstrates that those socioeconomic disparities continue. According to the 1990 Census, 46.4% of African-Americans in the State have incomes below the poverty level; the poverty rate for whites in the State is 13.2%. See U.S. Dep't of Commerce, Economics & Statistics Admin., Bureau of the Census, *1990 Census of Population: Social & Economic Characteristics: Mississippi* 83 (1993).

[11] Notification and re-registration procedures may be implemented in a discriminatory manner, and notice from the State may be the only way for NVRA registrants to discover that they are registered only for federal elections. The quality, accuracy, and reliability of that notice may well determine whether NVRA voters forego re-registering for state elections out of a mistaken belief that they are already effectively registered for all elections. The availability and accessibility of re-registration opportunities will bear heavily on this question as well. In light of the socioeconomic disparities found in *PUSH* and confirmed by the 1990 Census, see note 10, *supra*, ineffective notification and re-registration procedures may have an adverse impact on African-

Attorney General nor the District Court for the District of Columbia has been given that opportunity.

B. Mississippi's Current System For Implementing The NVRA Has Not Been Precleared

When a covered jurisdiction makes a preclearance submission, it "must identify with specificity each change that it wishes the Attorney General to consider." *Clark*, 500 U.S. at 658. "[A]ny ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Id.* at 656. Where a jurisdiction calls the Attorney General's attention to only some of the respects in which a new electoral scheme alters existing practice, "the Attorney General's failure to object to the submission [does] not constitute preclearance of elements in the scheme that were not submitted." *McCain* v. *Lybrand*, 465 U.S. 236, 256 n.28 (1984); see also *Hampton County Election Comm'n*, 470 U.S. at 181-182; *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 571 (1969).

The reason for this stringent rule is clear. In calendar year 1995, the Attorney General received approximately 4,000 Section 5 submissions involving over 14,000 proposed voting changes. As this Court observed in *Clark*, "[t]he requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." 500 U.S. at 658. The Attorney General is required to make a variety of complex factual determinations during the 60-day preclearance period and is not able, as a practical matter, also to "monitor and identify each voting change in each jurisdiction subject to § 5." *Ibid.* If States were not required to advise the Attorney General specifically of each change worked by a

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American Mississippians. The adequacy of these procedures is therefore central to determining the validity of Mississippi's federal-election-only implementation of the NVRA.

submission, "it would add to the Attorney General's already redoubtable obligations," "diminish covered jurisdictions' responsibilities for self-monitoring," and create an incentive for States to make their submissions as broad and ambiguous as possible. *Id.* at 658-659; accord *McCain*, 465 U.S. at 257.

With one exception,[12] the materials the State submitted to the Attorney General in December 1994 gave no indication whatsoever that voters enrolled pursuant to the NVRA might be registered only for federal elections and that election officials would now maintain separate voting lists for state and local elections. See pp. 6-7, *supra*. Indeed, the Secretary of State (the chief state election

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[12] Mississippi's submission did include the proposed state legislation to apply NVRA procedures to state and local elections. A single sentence in a table in a July 1994 compliance report included in the materials provided to the Attorney General stated that the proposed state legislation would "[m]ake NVRA provisions applicable to state and local elections to avoid a dual registration system." J.A. 72. That aspect of the submission might plausibly be read to suggest that without the proposed legislation, the applicability of NVRA procedures to state and local elections would be open to question. Mississippi's submission did not state, however, that the failure to enact that legislation would limit the application of NVRA procedures to federal elections only. No state official informed the Department, during the week between the tabling of the legislation on January 25, 1995, and the preclearance decision on February 1, that the failure of the legislation would have that effect. Nor did Mississippi's submission identify any mechanism for implementing the NVRA on a federal-election-only basis in the event that the proposed legislation failed to pass. The Attorney General was aware, moreover, that the executive in another State (Texas) had resolved a similar dilemma by implementing the NVRA administratively for all elections in the absence of conforming state legislation. See U.S. Mot. for Summ. J. Attachs. R and S. See generally *City of Lockhart*, 460 U.S. at 133 n.8 ("We doubt that Congress intended to force either [the Attorney General or the District Court for the District of Columbia] into speculation as to state law.").

official designated to coordinate implementation of the NVRA, see 42 U.S.C. 1973gg-8) had instructed subordinate officials to implement NVRA registration on a unitary basis—by applying the federal statute's procedures to all elections—and many of those officials followed that instruction. See p. 7, *supra*. Regardless of whether, in retrospect, the actions of Mississippi officials were appropriate as a matter of state law, those actions refute any suggestion that Mississippi had made clear its intention to treat NVRA registrants as ineligible for state and local elections. At the time of preclearance on February 1, neither the preclearance submission itself nor the actions of state officials made clear that Mississippi intended to limit its NVRA implementation to federal elections only. The State therefore failed to submit its current dual registration system for preclearance, and the Department's February 1 letter cannot reasonably be construed as approving that system. See *Clark*, 500 U.S. at 658 (covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider"); *Hampton County Election Comm'n*, 470 U.S. at 182 (preclearance of one state enactment could not be construed to validate other changes "that had not even been decided upon by state authorities at the time the Attorney General approved" the State's submission).

On February 10, 1995, state officials announced for the first time that NVRA registrants in Mississippi would not be eligible to vote in state and local elections. Six days later, the Department of Justice informed the State that, in the Department's view, the submission precleared on February 1 "did not seek preclearance for a dual registration and purge system." J.S. App. 25a. The February 16 letter serves as closely contemporaneous evidence of the Department's intent in preclearing the State's submission. Cf. *McCain*, 465 U.S. at 255-256 (noting that

"after-the-fact Justice Department statements have been previously relied upon in determining whether a particular change was actually precleared"). That letter further refutes any suggestion that Mississippi's dual registration system has been precleared by the Attorney General.

C. Mississippi's Decision To Implement The NVRA For Federal Elections Only Is Not Exempt From Preclearance, Either As A Nondiscretionary Act Required By Federal Law Or As A Correction Of A Prior "Misapplication" Of State Law

In refusing to enjoin the State's dual system of voter registration, the district court appeared to recognize that the current system had not been precleared. The court determined, however, that the State's decision to adopt that dual system was exempt from the preclearance requirement. The court based that conclusion on its belief that the State's decision was (1) a nondiscretionary act required by federal law, and/or (2) a permissible correction of a prior "misapplication" of state law. Neither of those theories provides a satisfactory basis for the court's refusal to enforce the preclearance requirement.

1. The district court asserted that "it is the federal government that has created this system of dual registration, not the State of Mississippi." J.S. App. 8a. In the court's view, that conclusion followed from the fact that "[t]he NVRA records are maintained at the instance of the federal government and pursuant to federal law." *Ibid.* The court concluded that "[t]he State of Mississippi, therefore, in registering federal voters under the NVRA and in maintaining these records, is simply performing a nondiscretionary act required by federal law, and thus the state has not effected a change in its laws or practices subject to preclearance by the United States Attorney General." *Id.* at 8a-9a.

That analysis contradicts this Court's precedents. "[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981). The NVRA requires States to use certain procedures in registering voters for federal elections. But nothing in federal law forbids a State to apply the Act's procedures in state and local elections as well. Mississippi's decision to limit the NVRA procedures to federal elections was a discretionary state policy choice, not the product of federal compulsion. Indeed, Mississippi stands alone among all 50 States (and other U.S. jurisdictions) in having adopted such a policy. Mississippi's decisions to adopt the particular notification, list maintenance, and purging procedures that it is using to implement the dual system were also discretionary.

This Court has long held that covered jurisdictions must obtain preclearance before implementing changes adopted in an attempt to comply with federal law. See *Allen*, 393 U.S. at 565 n.29 ("A State is not exempted from * * * § 5 merely because its legislation is passed in an attempt to comply with the [Voting Rights] Act."); *McDaniel*, 452 U.S. at 149-150 (covered jurisdiction must obtain preclearance for a change in its voting practices even where "a change is required to remedy a constitutional violation"). When it enacted the NVRA, Congress reaffirmed that rule. The statute expressly provides that it does not "supersede, restrict, or limit the application of" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(1). And "[n]othing" in the NVRA "authorizes or requires conduct that is prohibited by" the Voting Rights Act. 42 U.S.C. 1973gg-9(d)(2). Congress in fact rejected a proposed amendment that would have exempted NVRA implementa-

tion from Section 5's preclearance requirement. See H.R. Rep. No. 9, *supra*, at 37 (minority report). Where a State decides to implement the NVRA by changing its practice of enrolling all registrants for all elections, that decision, and the procedures the State employs to implement that change, must be submitted for preclearance.

2. As noted above, the Mississippi Secretary of State initially instructed subordinate officials to implement NVRA registration on a unitary basis, and many of those officials followed that instruction. The district court nevertheless held that the February 10 letter directing officials to cease that practice "did not effect a change subject to § 5 preclearance." J.S. App. 8a. The court explained that, in its view, "the state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." *Ibid.* For two reasons, the court's analysis provides no justification for its decision not to enjoin the State's current dual system.

a. As this Court's decisions make clear, a covered jurisdiction must obtain preclearance for a change from "the procedure *in fact* 'in force or effect,'" *Perkins*, 400 U.S. at 395, even where that procedure violates state law. In *Perkins*, the Court held that the City of Canton, Mississippi, was required to obtain preclearance before holding at-large aldermanic elections in 1969. The use of an at-large system constituted a change because the previous election, in 1965, had been held in single-member districts. *Perkins*, 400 U.S. at 394-395. The Court held that preclearance was necessary even though the use of single-member districts in 1965 had violated a pre-existing state statute requiring at-large elections. *Id.* at 394. It concluded that "the procedure *in fact* 'in force or effect' in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within § 5."

Id. at 395. The Court reaffirmed in *City of Lockhart* that the propriety under state law of a jurisdiction's existing practice is "essentially irrelevant" to the Section 5 inquiry, 460 U.S. at 132, because "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect," *id.* at 133. The Court further explained: "We also believe that the Attorney General and the District Court for the District of Columbia should be free to decide preclearance questions on the essentially factual issues of discriminatory purpose and effect. We doubt that Congress intended to force either into speculation as to state law." *Id.* at 133 n.8.

The Mississippi Secretary of State's directive to treat NVRA registrants as eligible for all elections was in place for over a month and resulted in the registration for state and local elections of "[a] few thousand" voters. J.S. App. 7a. Even if the Secretary of State's instructions were considered to have been conveyed in a relatively informal manner, this Court has made clear that even informal instructions may have Section 5 consequences. See *Hampton County Election Comm'n*, 470 U.S. at 178; *Allen*, 393 U.S. at 552, 570. And while the governor and legislature did not expressly and affirmatively ratify the Secretary of State's instructions, the Secretary of State is a constitutional officer of the State of Mississippi with substantial responsibility for elections; the governor had designated the Secretary of State as the Chief State Election Official for the purpose of implementing the NVRA; and both the governor and legislature were represented on the gubernatorially-created committee in which those instructions were developed. See U.S. Mot. for Summ. J. Attach. B. Nonetheless, until February 10, the governor and the legislature took no action to rescind, disapprove, or call into question the Secretary of State's

directive. The Secretary of State's instructions to local registrars, and their implementation of those instructions, therefore established a "standard, practice, or procedure" that was "in force or effect" within the State of Mississippi, 42 U.S.C. 1973c, and that could be changed only through preclearance under Section 5.[13]

b. Even if no unitary system of NVRA registration was ever "in force or effect" in Mississippi, it would not follow that the State may continue to implement its current dual system without obtaining preclearance. It is beyond dispute that Mississippi's current practices and procedures for voter registration differ substantially from those in effect prior to January 1, 1995. It is also clear that Mississippi's current system of NVRA implementation has not been approved by the Attorney General. Although the Department did issue a preclearance letter on February 1, 1995, its preclearance decision (as the February 16 letter made clear) reflected the premise that Mississippi had adopted a practice of permitting NVRA registrants to vote in all elections.[14] Even if it were

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[13] Not every isolated action by an official of a covered jurisdiction establishes a "standard, practice, or procedure" that is "in force or effect" (42 U.S.C. 1973c) within that jurisdiction. Cf. *United States* v. *Saint Landry Parish School Bd.*, 601 F.2d 859, 861-865 (5th Cir. 1979) (participation by three poll commissioners in illegal vote-buying scheme did not effect a change in the State's electoral practices subject to Section 5's preclearance requirement). The factors explained in text, however, fully justify the conclusion that the policy at issue here could be changed only through preclearance by the Attorney General or the District Court for the District of Columbia.

[14] The January 25, 1995, tabling of the proposed state legislation to reconcile state law with the NVRA created uncertainty as to whether Mississippi would continue to follow its then-existing practice of treating NVRA registrants as eligible to vote in all elections. Department of Justice officials were aware of that uncertainty and might have requested clarification as to the State's intentions before precleering

determined that no such practice was ever "in force or effect" within the meaning of Section 5, the significant changes effected after January 1, 1995, would remain subject to Section 5 scrutiny because the Department was not asked to, and did not, preclear a dual registration system. For that system to be validated as required by the Voting Rights Act, the Department or the District Court for the District of Columbia must be allowed to determine whether the State's program of NVRA implementation, taken as a whole, has the purpose or effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.

The district court appears to have concluded (see J.S. App. 8a) that the Department had precleared the procedures developed by the State to register NVRA voters for federal elections,[15] and that the validity of that pre-

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the submission that had previously been submitted. See 28 C.F.R. 51.37 (Attorney General may "request from the submitting authority any omitted information considered necessary for the evaluation of the submission"); *Georgia* v. *United States*, 411 U.S. 526, 539-541 (1973). With the benefit of hindsight, we acknowledge that such a request might have been preferable. At the time the Department issued its preclearance letter, however, there were significant reasons to favor expeditious action on Mississippi's submission. The NVRA required the State to implement the registration procedures specified therein beginning on January 1, 1995. The Voting Rights Act, however, prohibited the State from administering unprecleared changes in its voting procedures. Prompt preclearance of Mississippi's submission appeared at the time to minimize the tension between the conflicting legal mandates to which the State was subject. Of course, it was the State's responsibility in the first instance to comply in a timely manner with both the Voting Rights Act and the NVRA.

[15] Although the court's opinion is not entirely clear on this point, the court appears to have accepted Mississippi's contention that "the Attorney General precleared only those changes necessary to allow Mississippi to administratively implement the NVRA for federal elections, such as Mississippi's choices regarding the agencies desig-

clearance was unaffected by the State's subsequent decision to exclude NVRA registrants from eligibility to vote in state and local elections. The court's apparent reasoning was that (1) the State submitted, and the Attorney General precleared, an array of procedures for implementing the NVRA with respect to federal elections; and (2) the State considered, but ultimately declined to adopt, a similar set of changes in the procedures governing state and local elections.

That theory incorrectly presumes, however, that the State's NVRA registration procedures for federal elections can be properly evaluated in isolation—*i.e.*, without knowing whether NVRA registrants will be permitted to vote in state and local elections. As we explain above (see pp. 16-18, *supra*), the availability of expedited registration procedures for federal elections may have deleterious consequences for minority participation in state and local elections, particularly if NVRA registrants incorrectly conclude that they are eligible to vote in all elections. For example, registration forms (like those Mississippi submitted for preclearance) that do not clarify that their use is limited to federal elections may be entirely proper for use in a unitary NVRA system, but misleading, with discriminatory effect, if used in a dual system. Whether the State's current implementation of the NVRA will "have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. 1973c, may depend on the adequacy of the procedures used to inform NVRA registrants of their limited status. Cf. *City of Lockhart*, 460 U.S. at 131 (noting that "[t]he possible discriminatory purpose or effect of" changes subject to Section 5's pre-

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nated for federal registration and the methods used to purge federal voter registration lists." J.S. App. 3a.

clearance requirement "cannot be determined in isolation from the 'pre-existing' elements of" the electoral scheme).

Thus, even if the district court were correct that no unitary system of NVRA registration was ever "in force or effect" in Mississippi, the court erred in concluding that the Department's February 1 preclearance letter sufficed to authorize the continued implementation of the State's current scheme.[16] The State's announced decision to limit NVRA registrants to federal elections only, and its development of procedures designed to apprise those registrants of their limited status and of opportunities to register for state and local elections, occurred well after the Department issued that letter. Because the State's current method of NVRA implementation has not been precleared, the district court was required to enjoin its implementation.

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[16] Since Section 5 preclearance is required whether or not a unitary system of NVRA registration was in fact ever "in force or effect," this Court need not resolve that issue. However, when Mississippi's system of NVRA implementation is ultimately submitted for preclearance, the determination whether such a practice was formerly "in force or effect" may affect the "benchmark" (28 C.F.R. 51.54(b)(1)) against which the current federal-election-only regime should be assessed. If the State is found to have adopted, and the Department to have precleared, a practice of permitting NVRA registrants to vote in all elections, that practice would constitute the relevant benchmark. If it is determined that no unitary system of NVRA registration was ever "in force or effect" in Mississippi, the State's pre-1995 unitary system of voter registration (as modified by those precleared changes that *were* implemented after January 1, 1995) would furnish the relevant benchmark. See 28 C.F.R. 51.54(b)(1); *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for the entry of appropriate relief.

Respectfully submitted.

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APPENDIX

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides:

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or

subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day

period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

2. The National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, provides:

§ 1973gg. Findings and purposes

(a) Findings

The Congress finds that-

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are-

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

§ 1973gg-1. Definitions

As used in this subchapter-

(1) the term "election" has the meaning stated in section 431(1) of title 2;

(2) the term "Federal office" has the meaning stated in section 431(3) of title 2;

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 1973gg-5(a)(1) of this title to perform voter registration activities.

§ 1973gg-2. National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office-

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person-

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

(b) Nonapplicability to certain States

This subchapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after March 11, 1993, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after March 11, 1993, or that was enacted on or prior to March 11, 1993, and by its terms is to come into effect upon the enactment of this subchapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

§ 1973gg-3. Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information

No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license-

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to-

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that-

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application-

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) Change of address

Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) Transmittal deadline

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

§ 1973gg-4. Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to Section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if-

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person-

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee-1(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title.

§ 1973gg-5. Voter registration agencies

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies-

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include-

(i) State or local government offices such as public libraries, public schools, offices of city and country clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in para-

graph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not-

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to

lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall-

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance-

(i) the mail voter registration application form described in section 1973gg-7(a)(2) of this title, including a statement that-

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 1973gg-7(a)(2) of this title, unless the applicant, in writing, declines to register to vote;

(B)provide a form that includes-

(i)the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the

amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with_____.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the

office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation

All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a) of this section, and all nongovernmental entities are encouraged to do so.

(c) Armed Forces recruitment offices

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) of this section for all purposes of this subchapter.

(d) Transmittal deadline

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

§ 1973gg-6. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall-

(1) ensure that any eligible applicant is registered to vote in an election-

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except-

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reasons of-

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section;

(5) inform applicants under sections 1973gg-3, 1973gg-4, and 1973gg-5 of this title of-

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office-

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) of this section by establishing a program under which-

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that-

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends

the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) of this section to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude-

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant-

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the regis-

trant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant-

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the

registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d) of this section.

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 1973gg-8 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include-

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as

the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for a least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means-

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

§ 1973gg-7. Federal coordination and regulations

(a) In general

The Federal Election Commission-

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for im-

provements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2) of this section-

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that-

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application-

(i) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

§ 1973gg-8. Designation of chief State election official

Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this subchapter.

§ 1973gg-9. Civil enforcement and private right of action

(a) Attorney General

The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this subchapter.

(b) Private right of action

(1) A person who is aggrieved by a violation of this subchapter may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election

for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) Attorney's fees

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) Relation to other laws

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

(2) Nothing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

§ 1973gg-10. Criminal penalties

A person, including an election official, who in any election for Federal office-

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for-

(A) registering to vote, or voting, or attempting to register or vote;

(B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or

(C) exercising any right under this subchapter; or

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by-

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held,

shall be fined in accordance with title 18 (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31), notwithstanding any other law), or imprisoned not more than 5 years, or both.

MOTION FILED

Case No. 95-2031

(10)

NOV 12 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS YOUNG, et al.,

Appellants,

vs.

KIRK FORDICE, et al.,

Appellees.

ON APPEAL FROM THE THREE-JUDGE DISTRICT COURT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE COMMUNITY SERVICE SOCIETY OF NEW YORK AND AMERICAN ASSOCIATION OF RETIRED PERSONS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Community Service Society of New York and the American Association of Retired Persons seek leave to file the annexed brief as *amici curiae* in support of the appellants herein.

The Community Service Society of New York ("CSS") is a non-profit corporation that advocates for, and provides material relief to the poor with a history dating back 150 years. Since 1987 CSS has been authorized to practice law and, accordingly, has represented individuals and organizations that seek to enforce constitutional and statutory

provisions regarding the right to vote, and the right to vote free of unnecessary and discriminatory barriers. *United Parents Associations* v. *Board of Elections of the City of New York*, U.S.D.C., E.D.N.Y., 89 Civ. 612; *League of Women Voters* v. *Merrill*, U.S.D.C., D.N.H., Docket No. 1:95-232-M; *National Congress for Puerto Rican Rights* v. *Sweeney*, U.S.D.C., S.D.N.Y., Civ. No. 95-8742 (RO); *Disabled in Action* v. *Hammons*, U.S.D.C., S.D.N.Y. Civ. No. 96-7661 (WK); *Disabled in Action* v. *Giuliani*, N.Y. Sup. Ct., N.Y. Co., Index # 95-110646; *100% VOTE* v. *New York State Board of Elections*, N.Y. Sup. Ct., N.Y. Co., Index # 21920/90; *Cartagena* v. *Hooks*, N.J. Superior Court, Mercer Co., Docket No. _____.

The issues presented in this appeal are of great importance to CSS. CSS has consistently supported the goals of the National Voter Registration Act of 1993 ("NVRA") and presently serves as a national clearinghouse for all litigation under this Act. A network of over 50 attorneys around the country use the resources CSS provides to monitor NVRA implementation and to promote our goal of ensuring full and fair implementation of this Act. Moreover, CSS is directly involved in NVRA litigation in a number of states as well. The decision appealed to this Court directly affects every jurisdiction covered under Section 5 of the Voting Rights Act. In ruling that new programs designed to comply with the NVRA need not be reviewed for Section 5 purposes the court below effectively nullified the protections of the Voting Rights Act of 1965 in this critical area.

An affirmance of the ruling below would directly impair the ability of CSS to vindicate the rights of minority citizens and the poor. CSS, therefore, has a substantial interest in the outcome of this case. We accordingly request that this motion for leave to file the attached brief be granted.

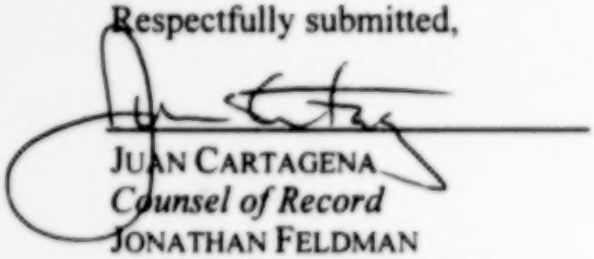
The American Association of Retired Persons ("AARP") also joins this motion for leave to file this *amicus curiae* brief in support of the appellants. AARP is a not-for-profit membership organization of approximately 32 million

persons, age 50 and older, dedicated to addressing the needs and interests of older Americans. AARP strongly supports unrestricted access to voter registration regardless of economic circumstance, disability, race, or other factors and has sought to increase participation in the vote -- on a nonpartisan basis -- among all Americans. Since AARP has been involved in voter education and voter registration activities for many years, the affirmance of the ruling below which limits the reach of the Voting Rights Act would also impede the ability of AARP to further its goals in the area of political participation, especially for older Mississippi residents. Accordingly, AARP joins CSS in requesting that this motion for leave to file the attached brief be granted.

Counsel for the appellees withheld their consent to the filing of this brief, necessitating this motion to the Court.

Dated: New York, New York
11 November 1996

Respectfully submitted,



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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Community Service Society of New York* (CSS) has served the poor for 150 years. Throughout this time CSS has provided direct services to the poor and immigrant communities of New York and has been a voice in promoting policies that enable these communities to escape poverty. CSS has spent considerable resources to promote the political participation of poor communities in the City of New York, and more recently, in the Northeast as well. To this end it was an early advocate of the proposition, now embodied in the National Voter Registration Act of 1993 (NVRA), that our government needs to play an active role in registering citizens to vote and in maintaining current voter registrations as valid and up-to-date. CSS has acted as counsel to individuals and organizations seeking to enforce the NVRA in New York, New Jersey and New Hampshire. Finally, CSS serves as a resource clearinghouse for all NVRA litigation in the country in the hope that the active political participation of our citizens who receive public assistance will improve our democracy and improve the conditions of the poor as a whole.

The *American Association of Retired Persons* (AARP) is a not-for-profit membership organization of approximately 32 million persons, age 50 and older, dedicated to addressing the needs and interests of older Americans. As the largest membership organization in the United States serving older persons, AARP strongly supports unrestricted access to voter registration regardless of economic circumstance, disability, race, or other factors. AARP has sought to increase participation in the vote -- on a nonpartisan basis -- among all Americans and has been involved in voter education and voter registration activities for many years. Moreover, AARP collaborated with dozens of national groups in advocating for passage of the National Voter Registration Act of 1993. Many of those most in need of easier voter registration are older Americans who want to participate but find it is hard to do so for reasons related to age and health. Given the potential ramifications of this case for older Mississippi residents who want to exercise their vote and AARP's commitment to total

access to the franchise, AARP joins in this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The Congress that passed the National Voter Registration Act of 1993 (NVRA) was fully cognizant of the discriminatory barriers to voting and voter registration that have historically disenfranchised eligible citizens, particularly minorities. The NVRA Congress recognized the importance of the Voting Rights Act of 1965 as a tool for combatting such discrimination. In passing the NVRA, Congress resolved to expand upon, not replace, the guarantees of the Voting Rights Act. Both the plain language and the legislative history of the NVRA, Section 11, confirm that the NVRA Congress intended the Voting Rights Act to be preserved as a source of rights and remedies independent of the NVRA.

The district court panel below failed to probe the meaning of Section 11 of the NVRA, in ruling that NVRA-related voting changes need not comply with the preclearance requirements set forth in Section 5 of the Voting Rights Act. Application of the NVRA, Section 11, compels the opposite conclusion, necessitating that the decision below be reversed.

ARGUMENT

I. CONGRESS CLEARLY INTENDED THAT COMPLIANCE WITH THE NVRA DOES NOT SUBSTITUTE FOR, NOR EXCUSE A STATE FROM COMPLIANCE WITH THE VOTING RIGHTS ACT OF 1965

The National Voter Registration Act of 1993 is the culmination of an extensive effort to eliminate the final barriers to discriminatory voter registration laws and policies. In passing the NVRA the 103rd Congress found that

> discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office

> and disproportionately harm voter participation by various groups, including racial minorities.[1]

In recognizing the discriminatory nature of certain registration practices, the NVRA can be considered an extension of the rights guaranteed by the Voting Rights Act of 1965.[2]

Clearly, however, its passage must be placed in the historical context in which the Congress has worked to ensure that the right to vote is made a reality for all citizens, especially those citizens who have been excluded from the franchise. Enfranchisement has been expanded through several constitutional amendments. The Fifteenth Amendment gave former Black slaves the right to vote in 1870;[3] the Nineteenth Amendment granted women's suffrage;[4] the Twenty-fourth Amendment outlawed the imposition of poll taxes;[5] and the Twenty-Sixth Amendment granted the right to vote to 18-year olds.[6] Congress continued to seek to enforce these constitutional guarantees with additional legislation including the Enforcement Act of 1870[7] which enforced the right to vote; the

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[1] 42 U.S.C. § 1973gg(a)(3).

[2] 42 U.S.C. § 1973, *et seq*.

[3] U.S. CONST. amend. XV states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[4] U.S. CONST. amend. XIX states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

[5] U.S. CONST. amend. XXIV states that "[t]he right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

[6] U.S. CONST. amend. XXVI states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."

[7] *See*, "Voter Registration," 69 CONG. DIG. 98, 99, n.17 (Apr. 1990).

Civil Rights Act of 1957[8] which provided for legal action to challenge discriminatory practices that interfered with the right to vote; the Civil Rights Act of 1960,[9] which afforded the federal government additional remedies to prevent the states from depriving citizens of the right to vote; and the Civil Rights Act of 1964[10] which increased access to voter registration for racial minorities in the country and provided for, *inter alia*, uniform standards of determining literacy.[11] All of this legislation was clearly insufficient to stem the tide of discriminatory voting laws, which led Congress to pass the comprehensive Voting Rights Act of 1965, signed by President Lyndon B. Johnson on August 6, 1965.

Congress was fully aware of this history when it passed the National Voter Registration Act of 1993[12] and in particular,

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[8] Pub. L. No. 85-315, 71 Stat. 634 (1957), codified in numerous sections of 42 U.S.C..

[9] Pub. L. No. 86-449, 74 Stat. 86 (1960), codified in numerous sections of 42 U.S.C..

[10] Pub. L. No. 88-352, 78 Stat. 241 (1964), codified in numerous sections of 42 U.S.C..

[11] For example, the Civil Rights Act of 1960 provided that any applicant for voter registration that achieved a sixth grade education predominately in English was presumed literate. "Voter Registration," 69 CONG. DIG. at 99, n.17. With the Voting Rights Act of 1965 Congress eliminated the English education requirement for all United States citizens who achieved an equivalent education in schools in Puerto Rico where the language of instruction was Spanish. 42 U.S.C. § 1973b(e).

[12] "Restrictive registration laws and administrative procedures were introduced in the United States in the late nineteenth and early twentieth centuries to keep certain groups of citizens from voting; in the North, the wave of immigrants pouring into the industrial cities; in the South, blacks and the rural poor." H.R. REP. No. 9, 103rd Congress, 1st Sess. 2 (1993). The Senate similarly recognized this history: "Throughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote -- which groups specifically depending on the decade and the locale. Among the techniques developed in the various localities to inhibit or exclude potential voters were annual registration, selective purging of the voter rolls, literacy tests and poll taxes. The

(Footnote continued)

when it specifically recognized the intersection of the nascent NVRA and the Voting Rights Act of 1965, as amended. In Section 11 of the NVRA Congress mandated that:

> **(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965.**
>
> **(2) Nothing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965.**[13]

Section 11 of the NVRA reflects a congressional intent to ensure that the NVRA and the Voting Rights Act are two complementary vehicles towards a non-discriminatory system of voter registration for federal elections. The reach of the Voting Rights Act cannot be understood as having been curtailed under any reading of this provision. Yet the decision below by the three-judge district court fails to follow, or even acknowledge, this mandate. Instead, the district court ruled that Mississippi need not comply with the preclearance provisions of Section 5 of the Voting Rights Act[14] when it

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Voting Rights Act of 1965 made most of these restrictive practices illegal, yet discriminatory and unfair practices still exist and deprive some citizens of their right to vote. This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act." S. REP. No. 6, 103rd Cong., 1st Sess. 3.

[13] 42 U.S.C. § 1973gg-9(d)(citations omitted; emphasis added).

[14] 42 U.S.C. § 1973c. Preclearance refers to the process in which covered jurisdictions under the Voting Rights Act must first obtain approval of changes in voting practices or procedures before implementation. Preclearance can be obtained administratively before the United States Attorney General or via a special court proceeding in the United States District Court for the District of Columbia.

changed from a unitary system of voter registration to a dual system because

> "[t]he fact that Mississippi election officials maintain the NVRA registrants on a separate registration roll for purposes of voting in federal elections only, does not constitute a change subject to § 5 preclearance."

Young v. Fordice.[15] This ruling,[16] *amici* submit, runs directly counter to Section 11 of the NVRA in at least two ways. It is inconsistent with Section 11(a) because it clearly limits, and in fact nullifies, the application of Section 5 of the Voting Rights Act where a state establishes new voting procedures to comply with the NVRA. Secondly, the ruling below is inconsistent with Section 11(b) because it authorizes conduct, here the implementation of a new dual voter registration system to replace a unitary system, without the requisite preclearance, which is directly prohibited by Section 5 of the Voting Rights Act.

Simply put, compliance with the NVRA does not substitute for, nor excuse one from compliance with the Voting Rights Act.

This proposition is also fully supported by the legislative history of the NVRA. Such legislative history may properly be considered under these circumstances. Although the judicial inquiry may end when the plain meaning of a statute has been discerned, it is appropriate to consult legislative history

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[15] U.S.D.C., S.D. Miss., Civil Action No. 3:95CV197 (L)(N), July 24, 1996, ¶20. The decision apparently is unreported but appears in Appellants' Appendix to the Jurisdictional Statement ("J.S. App.") at 1a.

[16] The district court below also ruled that a "state may correct a misapplication of its laws, which by its conduct it has not ratified, without obtaining preclearance of the United States Attorney General." J.S. App. at ¶19. *Amici* rely upon, and fully support, the arguments set forth by the Appellants in their main brief to this Court challenging this portion of the ruling as inconsistent with this Court's precedent.

in order to confirm the conclusion as to the statute's plain language.[17] Here, the legislative history contains assurances that Congress truly meant what it said and that the NVRA and the Voting Rights Act constitute two separate and complementary schemes.

In the deliberations in the House of Representatives, the minority members of the Committee on House Administration proposed doing exactly what the district court did below -- exempting from § 5 coverage procedures adopted in response to the NVRA. This proposal was discussed, incorporated into a proposed amendment to the NVRA, and rejected in Committee.[18] Specifically, the minority members of this Committee proposed an amendment to the NVRA

> "[p]roviding that mandates in the bill that are subject to pre-clearance for the nine southern states as required by the Voting Rights Act of 1965 be applied to all 50 states, **or in the alternative eliminating the pre-clearance requirements of the Voting Rights Act for any new mandates required by the bill."**[19]

Ironically, the proposed and rejected amendment would have included Mississippi in its exemption. Congress instead rejected the amendment and, accordingly, intended that preclearance go forward in states like Mississippi.

In the Senate the written legislative history regarding the NVRA also supports the proposition that compliance with the

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[17] *Central Intelligence Agency* v. *Sims*, 471 U.S. 159, 167-68 (1985); *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In *Garcia*, the Court found that only in "rare and exceptional circumstances" should legislative history be elevated above plain meaning as a tool of statutory interpretation. *Id.* (citation omitted). Nevertheless, in both *Central Intelligence Agency* and *Garcia*, the Court turned to legislative history as a tool for confirming a statute's plain meaning, the approach adopted here.

[18] H.R. REP. No. 9, 103rd Cong., 1st Sess. 36-37 (1993).

[19] *Id.* at 37 (emphasis added).

NVRA does not substitute for compliance with the Voting Rights Act. In its deliberations regarding the "list cleaning" devices authorized by the NVRA (i.e., procedures to eliminate the names of ineligible voters from official voter rolls) the Senate Report accompanying the NVRA states:

> Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. **The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act.**[20]

Finally, the report of the Committee of Conference of both houses, accompanying the NVRA, also repeats the theme of ensuring that nothing in the proposed NVRA be deemed to supersede the mandates of the Voting Rights Act. A proposed amendment to the NVRA that would have allowed States to require documentation of citizenship for voter registration applicants was rejected by the Conference Committee because of concerns regarding the impact on the Voting Rights Act, *inter alia*:

> "In addition, [the proposed amendment] creates confusion with regard to the relationship of this Act to the Voting Rights Act. **Except for this [amendment], this Act has been carefully drafted to assure that it would not supersede, restrict or limit the application of the Voting Rights Act.** These concerns lead the conferees to conclude that this [amendment] should be deleted."[21]

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[20] S. REP. No. 6, 103rd Cong., 1st Sess. 18 (emphasis added).

[21] H.R. CONF. REP. No. 66 (accompanying H.R.2), 103rd Cong., 1st Sess. 23-24 (1993) (emphasis added).

The Voting Rights Act protections embodied in Section 11 of the NVRA were also the source of discussion during the floor debates. The requirement that governmental actors comply both with the NVRA and the Voting Rights Act was first introduced in the National Voter Registration Act of 1989, an unsuccessful predecessor to the National Voter Registration Act of 1993. In the 1989 Act, section 111 (d) provided:

> (d) Relation to Other Laws -- The remedies under this section are in addition to the Voting Rights Act of 1965 as amended and to any other remedy provided by law.

Floor statements confirmed that, by introducing this provision, Congress intended the NVRA to supplement, rather than supersede, the rights and remedies available under the Voting Rights Act. For example, Representative Swift[22] stated:

> "Does this bill have any affect [sic] on the Voting Rights Act as amended? Here too, the answer is no. As I mentioned earlier, this bill establishes a new legal framework addressing registration in addition to existing law, in particular, the Voting Rights Act. Nothing in this bill is meant to change the existing rights and remedies provided under the Voting Rights Act or to undercut the standards of proof governing that act."[23]

In 1991, a new version of the Act was introduced, in which the intent underlying the 1989 clause was preserved. Congress introduced a clause with language that was essentially identical to the clause eventually enacted as Section 11 of the

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[22] Representative Swift was a sponsor of the NVRA, as well as a signatory to the 1993 House report and the 1993 Conference Committee report, both described above.

[23] 136 CONG. REC. H255 (daily ed. Feb. 6, 1990) (discussing H.R. 2190, the National Voter Registration Act of 1989, predecessor to the National Voter Registration Act of 1993).

NVRA. The Senate Report confirmed that, by including such language, Congress intended the Voting Rights Act to be preserved as a source of rights and remedies independent of the NVRA. In fact this Senate Report uses virtually identical language to the Senate Report of 1993 accompanying the NVRA and cited above.[24]

In every version of the NVRA introduced since 1989, Congress consistently stated that compliance with the NVRA would not excuse a State from also complying with the Voting Rights Act. For example, during the floor debates on the National Voter Registration Act of 1991, the following colloquy confirmed the congressional intent:

> Senator Hatfield:[25] "A question has been raised about language in the committee report regarding the Voting Rights Act of 1965. It suggests that use of the National Change of Address Program would be deemed to be in compliance with the requirements of the bill that a voting list verification program be uniform, nondiscriminatory and in compliance with the Voting Rights Act of 1965. Is it the intent of the committee that S. 250 would insulate all State or local programs using the NCOA from challenge under the Voting Rights Act of 1965?"

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[24] "Merely because a program was conducted under the National Voter Registration Act would not be a defense to any claim which might be asserted under the Voting Rights Act. The requirements of the two acts are distinct and complementary. The States must comply with the National Voter Registration Act in a manner which does not violate the Voting Rights Act." *Establishing National Voter Registration Procedures for Federal Elections, and for Other Purposes*, S. REP. No. 60, 102nd Cong., 2nd Sess. ___ (1991), *available in* LEXIS, CMTRPT file, at *17. This language is identical to the excerpt cited above from S. REP. No. 6, 103rd Congress, 1st Sess. 18 (1993).

[25] Senator Hatfield is a signatory to the 1993 Senate Report cited above.

> Senator Ford:[26] "No. The committee did not intend to insulate State or local list verification programs that used the NCOA from challenge under the Voting Rights Act of 1965. The bill is quite clear in this regard."[27]

Finally, during the debates on H.R. 2, the National Voter Registration Act of 1993, Congress addressed the specific question at issue in this case, namely, whether States covered under section 5 of the Voting Rights Act can use compliance with the NVRA as grounds for failing to seek preclearance. Congress answered this question in the negative, requiring covered jurisdictions to continue to seek preclearance for any voting changes.[28] A member of Congress from Louisiana, one of the covered jurisdictions, stated:

> The motor vehicle licensing provision becomes, by the way, subject to the Voting Rights Act. And for those people that live in Alabama, Mississippi, Louisiana, and all of the nine States covered by the Voting Rights Act of 1965, those people may or may not know that the election representatives in all of their counties already have to report to the Justice Department to preclear any changes, any changes that they have to their election laws with the Justice Department before those laws can go into effect. . .
>
> What this means is that they are also going to have to check out all of their changes with the Justice Department once this law is passed. And in order to comply with this law they are going to have to make

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[26] Senator Ford was a sponsor of the NVRA, as well as a signatory to the Senate and Conference Reports, cited above, that accompany the NVRA.

[27] 138 CONG. REC. S6860 (daily ed. May 19, 1992) (discussing S. 250, the National Voter Registration Act of 1991, predecessor to the National Voter Registration Act of 1993).

[28] *See supra* text accompanying notes 18-19, regarding the House Committee's explicit rejection in 1993 of such an amendment to the NVRA.

> massive changes, so we are talking about untold bureaucratic hours, manhours wasted and just thrown away because of compliance with this unnecessary and terribly expensive and terribly burdensome law.[29]

Regardless of the concerns as to the possible burdens imposed by the § 5 preclearance requirement, the floor debates make clear that the plain meaning of Section 11 of the NVRA is amply supported by the legislative history.

The plain meaning and legislative history both confirm that compliance with the NVRA cannot be deemed a defense to non-compliance with the Voting Rights Act. Therefore, the decision of the district court below, which effectively ruled otherwise without addressing the meaning of Section 11, is erroneous as a matter of law.

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[29] 139 CONG. REC. H294 (daily ed. Jan. 27, 1993) (statement of Representative Livingston) (discussing H.R. 2, the National Voter Registration Act of 1993).

CONCLUSION

For all the foregoing reasons *amici* respectfully request that this Court reverse the decision of the three-judge district court for the Southern District of Mississippi.

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Respectfully submitted,

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